UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-23538-rdd

- x

In the Matter of:

SEARS HOLDINGS CORPORATION,

Debtor.

- x

United States Bankruptcy Court

300 Quarropas Street, Room 248

White Plains, NY 10601

April 18, 2019

10:46 AM

B E F O R E :

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

HEARING re Debtors Motion to (A) Enforce Asset Purchase Agreement and Automatic Stay Against Transform Holdco LLC and (B) Compel Turnover of Estate Property, and (II) Response to Transform Holdco LLCs Motion to Assign Matter to Mediation (related document(s)2766) (document #2796)

HEARING re Motion to Compel Payment of Post-Petition Rent and Related Lease Obligations Pursuant to 11 U.S.C. §§ 105(a), 363(e), 365(d)(3) and 503(b)(l)(A) and to Pay All Subsequent Amounts Owed On a Timely Basis filed by Robert L. LeHane on behalf of Trustees of the Estate of Bernice Pauahi Bishop (document #2414)

HEARING re Initial Supplemental Brief in Response to Debtors' Motion to (A) Enforce Asset Purchase Agreement and Automatic Stay Against Transform Holdco LLC and (B) Compel Turnover of Estate Property, dated April 2, 2019 (REDACTED) (related document(s)2796) filed by Abena Mainoo on behalf of Transform Holdco LLC (document #3011)

HEARING re Debtors' Supplemental Memorandum of Law in Further Support of Their Motion to Enforce the Automatic Stay (related document(s)2796, 2864) (document #3079)

HEARING re Transform Holdco LLC's Supplemental Reply Brief in Response to Debtors' Motion (A) Enforce Asset Purchase Agreement and Automatic Stay Against Transform Holdco LLC and (B) Compel Turnover of Estate Property [REDACTED] (related document(s)3079, 2796) filed by Abena Mainoo on behalf of Transform Holdco LLC. (document #3156)

HEARING re Transform Holdco LLC's Response to Debtors' (I) Motion to (A) Enforce Asset Purchase Agreement and Automatic Stay Against Transform Holdco LLC and (B) Compel Turnover of Estate Property and Reply in Further Support of Its Motion to Assign Matter to Mediation (related document(s)2766, 2796) filed by Abena Mainoo on behalf of Transform Holdco LLC. (document #2864)

HEARING re Joinder of the Official Committee of Unsecured Creditors to Debtors (I) Motion to (A) Enforce Asset Purchase Agreement and Automatic Stay Against Transform Holdco LLC and (B) Compel Turnover of Estate Property, and (II) Response to Transform Holdco LLC's Motion to Assign Matter to Mediation (related document(s)2796) filed by Ira S. Dizengoff on behalf of Official Committee of Unsecured Creditors of Sears Holdings Corporation, et al. (document #2808)

HEARING re Motion of Wilmington Trust, National Association, as Indenture Trustee and Collateral Agent to Prohibit or Condition Debtors' Continued Use of Collateral, Including Cash Collateral filed by Edward M. Fox on behalf of Wilmington Trust, National Association (document #3050)

HEARING re Objection / Joinder of the Official Committee of Unsecured Creditors to Debtors' Objection to Motion of Wilmington Trust, National Association, as Indenture Trustee and Collateral Agent, to Prohibit or Condition Debtors' Continued Use of Collateral, Including Cash Collateral (related document(s)3198)(document #3210)

HEARING re Motion of Debtors to Compel Turnover of Estate Property filed by Sunny Singh on behalf of Sears Holdings Corporation (document #2715)

HEARING re Community Unit School District 300's (I) Objection to Debtors' Motion to Compel Turnover of Estate Property and (II) Reply to Debtors' Objection to Motion of Community Unit School District 300 for Relief From the Automatic Stay or, in the Alternative, Abstention (Related Documents 652, 1280, 2715 and 2717) (related document(s)2715, 652) filed by Allen G. Kadish on behalf of Community Unit School District 300 (document #2996)

HEARING re Supplemental Objection to Debtors' Motion to Compel Turnover of Estate Property (related document(s)2996, 2715) filed by Allen G. Kadish on behalf of Community Unit School District 300 (document #3247)

HEARING re Motion of Community Unit School District 300 for Relief from the Automatic Stay (document #652)

HEARING re Debtors' Objection (document #1280)

HEARING re Motion of Community Unit School District 300 for Relief From the Automatic Stay or, in the Alternative, for Abstention filed by Allen G. Kadish on behalf of Community Unit School District 300 (document #652)

HEARING re Motion to Compel Payment of Post-Petition Rent and Related Lease Obligations Pursuant to 11 U.S.C. §§ 105(a), 363(e), 365(d)(3) and 503(b)(l)(A) and to Pay All Subsequent Amounts Owed On a Timely Basis filed by Robert L. LeHane on behalf of Trustees of the Estate of Bernice Pauahi Bishop (document #2414)

HEARING re Objection of Transform Holdco (document #2832)

HEARING re Debtors' Response and Reservation of Rights (document #3169)

HEARING re Response of Trustees of the Estate of Bernice Pauahi Bishop (document #2922)

HEARING re Motion to Compel Debtor in Possession to Assume and Assign, Or, Alternatively, to Reject, Unexpired Lease on Real Property (Sears Contract No. S8729-73-A) by Dedeaux Inland Empire Properties filed by William P Fennell on behalf of Dart Warehouse Corporation (document #2980)

HEARING re Debtors' Objection (document #3168)

HEARING re Motion for Payment of Administrative Expenses Pursuant To 11 U.S.C. §503(a), 503 (b)(l)(A), and 507(a)(2) for Mauldin At Butler LLC, Other Professional, period: 1/1/2018 to 12/31/2018, fee:$, expenses: $88,660.08. filed by Mauldin At Butler LLC (document #2690)

HEARING re Debtors' Objection (document #3163)

HEARING re Reply of Mauldin at Butler, LLC (document #3225)

HEARING re Motion of Debtors for Entry of an Order Authorizing and Approving Procedures for Settling De Minimis Affirmative Claims and Causes of Action of the Debtors (document #3031)

HEARING re Limited Objection of Wilmington Trust, National Association (document #3144)

HEARING re Motion for Payment of Administrative Expenses Motion of Winners Industry Co., Ltd. for Allowance and Payment of Administrative Expense Claims. filed by Winners Industry Co., Ltd. (document #1386)

HEARING re Notice of Agenda of Matters Scheduled for Hearing on April 18, 2019 at 10:00 a.m.

HEARING re Debtors' Objection (document #2839)

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Okay, good morning. In re Sears Holdings Corporation et al?

MR. SCHROCK: Good morning, Your Honor. Ray Schrock, Weil Gotshal on behalf of the Debtors. Your Honor, before we get started and move into the main agenda, I just had a quick update for the Court and parties in interest and some recent case developments.

THE COURT: Okay.

MR. SCHROCK: First, Your Honor, I want to report that the Debtors have selected two firms in consultation with the Creditors' Committee to pursue preference recoveries. This is following a competitive process, you know, working with the parties. And we think what we have are market leading recovery -- or market leading pricing for contingency fees on those, so the ASK firm and Acumen/(indiscernible) that have been selected by the estate to pursue those recoveries. And I believe, you know, the Committee and the Debtors are both supportive of those.

THE COURT: And these are basically preference claims?

MR. SCHROCK: These are just preference claims, Your Honor.

THE COURT: Okay.

MR. SCHROCK: And you know, there's -- there were

roughly $3.8 billion of transfers in the 90 days before the cases were commenced. When you take out some of the low-hanging fruit, the exclusions, you know, it's roughly $1.9 billion. And you know, we do have some estimates that you know, we believe will be recoverable, but we do think that those firms getting started, getting demand letters out soon and starting to get that process moving is crucial to, you know, the plan process and driving the estate's recoveries.

THE COURT: Okay. Hopefully that process won't be finished by the time our plan is confirmed in the case, so obviously, I would hope you -- I would consider how to integrate that into a plan --

MR. SCHROCK: Yeah.

THE COURT: -- a post-effective date plan structure.

MR. SCHROCK: We are, Your Honor, we would contemplate that those firms would ultimately be retained by a post-consummation trust born under the Chapter 11 plan. And you know, those would continue also to work of course with chambers so that we don't necessarily cause too much trauma to your docket as well as we would put that protocol together.

THE COURT: Okay. Well, and that's the other point I just wanted to raise. I don't know how many potential defendants there are, but clearly, in other cases,

the adoption of sort of the overall procedures for dealing with these types of claims has been successful, sort of along the lines of what you've done with personal injury claims in other contexts, so hopefully -- I hope they will be considering that as a possibility, at least.

MR. SCHROCK: We are, Your Honor, and we'll work on the protocol and hope to get it through with the Committee and get it in front of Your Honor, the Crothers Committee that is, and get it in front of Your Honor here in short order.

THE COURT: Right. It's obviously something you want to discuss with the Committee.

MR. SCHROCK: Of course, very much.

THE COURT: Okay, all right.

MR. SCHROCK: Your Honor, a quick Chapter 11 plan update. Following several weeks of discussions with the -- with certain Creditors and the Unsecured Creditor's Committee, we have filed the Chapter 11 plan and a company disclosure statement to wind up the affairs of these Chapter 11 cases.

A few notes on this point. As everybody I'm sure is very aware that the cases are -- they're expensive. The administrative costs are significant. There's only one way, we believe, to finish these cases, and that's to start the clock. We've set a -- asked for a disclosure statement

hearing for May 16th. We think that by starting the clock and working with the stakeholders and really driving the process leading from the front and getting people to focus on what's really necessary in order to wind up the estates, that's the only way it's going to happen.

But this is after, you know, roughly serving out 60 days ago the first draft of a plan. You know, I think some claimants would say let's please wait. And you know, our view, our strong view here is that if you don't have deadlines associated with the plan process, gravity will take over. And it's very difficult to get the estates efficiently wound up.

There's still a significant amount of work. Even though the assets are largely gone associated with the ongoing operations, there's very significant services that are still being provided by the estate, including transition services, issues related to executory contracts, cure reconciliation.

And I wish I could tell Your Honor that it's just, you know, it's a one-person job at Weil and Akin to, you know, go through all of those claims, but it's not. It's literally, you know, hundreds of inquiries every day and trying to work through the employee issues, the regulatory issues, the bank issues. There's still quite a bit that's going on, so those transition services are ongoing, and you

know, we know that we have to wrap things up.

The plan overall, it's a non-consolidated plan. It's a straight, what I call waterfall plan, with only one settlement at this time incorporated, which is with the PGBC. The plan has a mechanic that's under discussion for resolving inter-company claims, which remains open. So like any company, Sears did not have cash at every legal entity within the structure.

Some entities have cash, some entities don't, some have -- we know more assets, some have less, and that's very common in our experience in any complex structure. So to deal with this issue, we have a non-consolidated plan and an ability for one Debtor to make loans to another Debtor, if they believe there are sufficient recoveries to deal with it.

We're also in discussions with certain Creditors around, is there a compromise around inter-company claims that everybody can get behind. As you might imagine, that's a very -- it's a very complex negotiation, but we do think we have at least one mechanic to preserve the integrity of a non-consolidated plan.

The 503(b)(9) claims bar date has passed. We expect to complete the initial reconciliation of claims in the next few days and we'll sit down with the Unsecured Creditor's Committee and professionals to review them. I

think the good news is that based upon our preliminary review, that we think valid claims are coming in right around the range that we have previously disclosed to parties in interest in the Court and in line with the Debtor's expectations.

We do have, of course, the Transform Co assumption, or not assumption, reimbursement of approximately $140 million of those claims, which Mr. O'Neill likes to remind me would be subject to offset, if there are any costs that would be going the other direction.

507(b) claims, which parties in, you know, some parties that are surveyed are very significant numbers are just treated as a straight waterfall under the plan. We do not have a global settlement with 507(b) claimants at this time. We've had initial discussions with Cyrus, which I would characterize as hopeful and somewhat productive.

I wouldn't say that they were vigorous at this point. But our focus was to sit down with the UCC, get to a deal -- try and get to a deal. We didn't reach a deal yet. But at least file it and use the filing of the plan as a mechanic to sit down with the large 507(b) claimants in these cases, in the very near future.

So in that vein, our plan is to sit down in the next week with the key stakeholders, including Cyrus, Wilmington, ESL, so that we can address how some of those

507(b) claims can be teed up with the Court. I've had some initial discussions with ESL's counsel just around, you know, if it's an estimation proceeding or the right, at least procedural mechanic to get those in front of the Court in conjunction with a plan process as well as a reserve mechanic.

But we believe firmly that the structure in place and the tension of a disclosure statement here and a confirmation hearing, that we're going to be able to lead parties to get to something that's workable to wind up the affairs of the estate. We have to wind this up some way, and we believe this is the best way to do it.

There's a litigation or a post-consummation trust that I referred to earlier that's in the plan. That was after a great deal of coordination among the tax professionals at Akin and Weil that we believe that that's the right structure for claim holders and beneficial interest holders in the trust.

We've left the governance of the trust open as TBD. That's subject to ongoing negotiations with stakeholders, including the 507(b) claimants in the UCC. We've left the position of the litigation trustee open at this time. It's still being subject to negotiation. You know, we just also wanted to mention the administrative claims bar date.

We do have that concept in the plan. When the particular date is still subject to discussion. We've dealt with this issue in two ways in prior cases, including cases in front of this Court, where we've had the admin claims bar date, you know, at confirmation or even sometimes in advance of confirmation. We've heard from stakeholders arguing each way, but we'll certainly resolve that over the next couple of weeks.

And then, finally, on releases. There's a mechanic in the plan that provides that if a party's named in a plan supplement document or otherwise in a complaint, they will not be released. The releases under -- are under the exclusive authority within the Debtors of the restructuring subcommittee, consistent with their mandate. Those issues are still being under discussion, but that's the mechanic that's in there right now.

THE COURT: And you're referring to releases by the Debtor's estate?

MR. SCHROCK: Yes, thank you, Judge. Yes, just Debtor releases. There is not non-consensual -- there are no non-consensual third party releases in the plan.

THE COURT: Okay.

MR. SCHROCK: And then finally, Your Honor, just as I referred to earlier, there's, you know, related to the other work that's ongoing at the estate, there's quite a few

disputes that we're still working through with Transform Co. Some of those are up today.

We are providing, you know, pretty extensive transition services at this point, and we still have all of the employees that are still employed effectively by the Debtors and are being leased to Transform Co. So we have numerous deals that have to be worked out with Creditors and Transform Co to allow those parties to have a fresh start with new Sears, and as well, still balance the estate interests that we're not compromising the claims that have been reserved for the benefit of the estate, namely the preferences and the other litigation issues.

But the work is time intensive. We are very mindful of the costs in this case, and we are going to do our level best to try and get these estates through a confirmed plan process by July. And we have, you know, tentatively talked with parties about, you know, a date for confirmation around the third week in July.

So we don't have broad support for the plan at this time, but we believe the getting in on file and driving the process is the right answer for these estates. And then, finally Your Honor, I know that the parties made notice we did -- the restructuring subcommittee did file a complaint last -- late last evening against a number of parties. I'm sure there'll be plenty of time for discussion

on those issues at another point. But you know, that action is in fact under way.

THE COURT: Okay. Does anyone have anything to say on that report? Okay. Well, obviously, the Debtors and their professionals have the task of moving the case along as promptly and efficiently as possible. I appreciate there are a number of steps that need to be taken before you're nearly at the point to confirm a plan, but it clearly to me makes sense to be moving forward as you are within active consultation with the key parties in interest.

It's in their interest, too, except perhaps, although I think it's in their interest also, parties that may view themselves more as litigation targets than Creditors. But frankly, I think resolving the cases promptly is in everyone's interest.

And in that regard, I only have a couple of observations. The first is that if the cost of doing your company analysis or the difficulty of it exceeds the benefit, you know, there is an alternative, which is substantive consolidation, so that's something to be aware of.

MR. SCHROCK: Yes, Your Honor. We're chiefly aware of that and --

THE COURT: Okay.

MR. SCHROCK: -- I think we're hopeful that

reasonable minds will agree on something.

THE COURT: Well, it depends – I mean it's a factual show, if you can actually make the analysis, then ignore what I just said.

MR. SCHROCK: Yes.

THE COURT: Secondly, as far as the necessary reconciliation of claims is concerned necessary for confirming a plan that is, you're absolutely right. They're under the authority to estimate claims.

And given the actual outcome of the sale and the related GOB sales, that should be a much easier process. So again, it's not something that I think parties should spend a lot of time and money on trying to negotiate, if there's just an impasse. I think you may just want to tee up an estimation on that -- on that score.

MR. SCHROCK: That's -- that was our thinking exactly, Your Honor.

THE COURT: Okay. I mean, unlike when it was being discussed during the sale hearing, when I was asked to compare alternatives as far as 507(b) claims are concerned, we don't have an alternative scenario here. We actually have the facts, so I think it's a lot easier to decide at this point.

MR. SCHROCK: Thanks very much.

THE COURT: Okay. So why don't we proceed then

with the agenda?

MR. SCHROCK: Yes, Your Honor. The first item on the agenda is the Debtor's motion to enforce the asset purchase agreement automatic stay against Transform Holdco, and I'll cede the podium to my partner, Mr. Friedmann.

THE COURT: Okay.

MR. FRIEDMANN: Good morning, Your Honor, Jared Friedmann from Weil, Gotshal on behalf of the Debtors. Before I get into the credit card accounts receivable issue we were discussing at the last hearing, I wanted to put on the record where we are with respect to the interim agreement we advised you of at the last hearing regarding the two other categories of assets that we've moved on in our motion to enforce the automatic stay.

THE COURT: Okay.

MR. FRIEDMANN: As we advised you then, the basis of that agreement was that there were initial payments that were to be made to Debtors on March 26th. And then, we gave Transform until April 3rd to complete the reconciliation process and pay us whatever the remainder was of the undisputed amounts.

So with respect to the cash in transit, and those are the pre-closing proceeds that ended up in Transform, because we had transferred the cash management system over to Transform at closing, so these were pre-closing proceeds

that ended up in the bank accounts they were intended for, but those bank accounts were no longer in our possession so they went over to Transform and we were moving to get them back.

So on March 26th, consistent with our agreement, the Debtors were paid $3 million and they were produced documentation regarding the reconciliation at that point. On April 3rd, pursuant to the agreement, Transform was supposed to pay Debtors any amount above and beyond that $3 million initial payment and to also provide us with additional reconciliation.

On April 4th, Transform confirmed that the total amount of cash in transit in the cash management system was $22.5 million, so $19 and a half million more than they had paid us on March 26th. There is no dispute regarding that $22.5 million number. To date, however, Transform has refused to turn over that $19 and a half million delta in cash in transit proceeds. And again, these are dollars that we would have had in our bank accounts, had we not given them our bank accounts.

THE COURT: And what's the stated rationale for not paying it?

MR. FRIEDMANN: The stated rationale, as we understand it, and this is for both the cash in transit as well as the rent proration, which I'll discuss in a moment,

is, as we understand it, that there are other set-offs. And in our discussions, we've reminded Transform of Your Honor's admission at the last hearing that set off our -- an excuse and they still violate the automatic stay. It hasn't worked yet so far.

So as -- we're willing to give Transform until next Thursday to turn over these funds to us, otherwise, we anticipate moving on an expedited basis to have another hearing because we need these dollars now.

THE COURT: And has Transform identified to you what the basis for the claims over are?

MR. FRIEDMANN: There are a series of various setoffs and reconciliations that necessarily are happening between the companies and we're happy to work through those. Our point with respect to both the cash in transit and the rent proration, these are announced at our estate property and were supposed to be turned over to us immediately.

No doubt there would be later reconciliations on a number of other issues, which we're happy to work through with them, but these are -- this is estate property that they're holding onto and not turning over on the rent proration and the APA --

THE COURT: Can I interrupt you?

MR. FRIEDMANN: Please.

THE COURT: I understand reconciliations. That

presumes that the parties still trying to work out what is owing. But I'm trying to understand whether Trans Co has asserted that there are actually separate and apart from just trying to figure out the ultimate purchase price, whether there are amounts owing by the Debtors to it, that would be the set off. The rest is a reconciliation of amounts that are to be paid and still to be decided to be paid, in other words.

MR. FRIEDMANN: Yeah, so it's a series of other set offs, and there are other buckets where monies are owed from Debtors to Transform Co.

THE COURT: Okay.

MR. FRIEDMANN: And so, they're using those other buckets to offset the cash in transit and the real estate prorations, as we understand it at this point.

THE COURT: Are those owed under the purchase agreement? It's asserted as being owed under the purchase agreement? I don't understand. They're the buyer. Why would the Debtor be owing them money except as part of reconciling the ultimate purchase price?

MR. FRIEDMANN: Yeah, so that's exactly what -- it's reconciling -- they should --

THE COURT: Well, but that's reconciling amounts that were made to be paid as opposed to amounts that are already owing.

MR. FRIEDMANN: Correct.

THE COURT: I think that's the important distinction. So I just reiterated what I said last time. I don't see any basis not to pay this money, unless you know, they disagree and say that the Debtors independently owe Trans Co something, as opposed to Trans Co has the right under the purchase agreement to adjust remaining amounts, not these amounts, but other amounts that are still to be fixed.

MR. FRIEDMANN: The -- just to be on the record also, respectfully, the rent -- the February rent proration, they are too consistent with the agreement on March 26th, Transform paid Debtors $5 million and produced documentation at that time, calculating where -- how they've gotten there so far.

On April 3rd, they were supposed to pay any amounts over that $5 million owed in rent proration and provided Debtors with backup. On April 4th, Transform advised and it confirmed that $14.9 million in rent proration was due. They were still reconciling apparently another $1.3 million of that.

Now while we believe that the $1.3 million is also due and owing to the Debtors, the $9.9 million delta between the $5 million they gave us on March 26th and what they had already determined was owed by April 4th has also not been

paid. So in total, there is the $19.5 million in cash in transit, plus the $9.9 million in rent proration.

So $29.4 million in total that we believe is estate property that should be turned over immediately, and as I said, it is -- we've -- you know, we're happy to wait until next Thursday for them to do what needs to be done to get that money to us, but if we do not receive that money by next Thursday, we do anticipate moving the Court on an expedited basis.

THE COURT: Okay.

MR. FRIEDMANN: And the turn now to the credit card receivables account at issue. So as I -- a preliminary matter, I just wanted to move into evidence the second supplemental declaration of (indiscernible) in support of the motion to enforce, which is Document 3080.

THE COURT: Okay. As I understood it, the parties were not going to be treating this as a hearing with live testimony. Is that correct?

MR. FRIEDMANN: I believe from my discussions with my colleagues at Cleary that neither of us intend to call any witnesses today.

THE COURT: Okay, all right, so if there's no objection to the admission of that declaration, subject to sometime in the future if need be, you have the right to examine the witness on anything other than just the

documents that were provided. Okay, I'll admit it, then.

(Document 3080 Admitted Into Evidence)

MR. FRIEDMANN: So Your Honor, the Court asked the party to submit a supplemental briefing addressing whether the credit card processing agreements filed by the buyer on the eve of the March 21st hearing helped clarify in any way whether or not the reserve accounts at issue fall within the APA's definition of credit card accounts receivable.

THE COURT: Right. And I also wanted to make sure I had all of those agreements, which I believe I do now, I have.

MR. FRIEDMANN: They would know better than we do, and we're assuming that they've pre-solved them.

THE COURT: Okay.

MR. FRIEDMANN: And frankly, I'm not sure it matters that much because from the agreements that we've seen, those agreements demonstrate or at least do nothing to refute that the reserve accounts do in fact fall within the definition of credit card accounts receivable.

The buyer's initial brief and then their subsequent reply brief repeat the same argument over and over again, and because the reserve accounts describe their treated something and as they -- a security in the processing agreements, that therefore, those reserve accounts must also be a security deposit and cannot be

credit card accounts receivable within the meaning of the APA.

And that argument, we submit, is fundamentally flawed. The fact that the reserve accounts are described or treated as security under the processing agreements does not mean that they'd be -- necessarily become security deposits within the meaning of the APA. All that matters here is how the Debtor and the buyer define credit card accounts receivable in the APA, and whether the reserve accounts fall within that definition, which they plainly do. Likewise --

THE COURT: That's because the operative paragraph is Paragraph 10?

MR. FRIEDMANN: I think the operative paragraph is the definition of credit card accounts receivable, which is --

THE COURT: Well, I understand, but --

MR. FRIEDMANN: Right. And then 10.9.

THE COURT: It flows through Paragraph 10 because that's the mechanism where credit cards accounts receivable comes into play.

MR. FRIEDMANN: That's correct, Your Honor. But --

THE COURT: Okay.

MR. FRIEDMANN: -- and credit card -- it includes the defined term credit card accounts receivable, which

requires you to go back to the definition.

THE COURT: Right.

MR. FRIEDMANN: Likewise, the fact that the reserve account serve a security under collateral to protect the processors from default doesn't change the fact that the reserve accounts are ultimately due and payable to Sears, a fact that the buyer does not and cannot really dispute. In fact, in their initial moving brief, they cite the American Express amended agreement in Section 2, which explains that although American Express was not currently obligated to pay Sears anything in their reserve accounts, it ultimately is obligated to return an amount equal to the amount in the reserve, not of any current obligations. So at all times, that money is due and owing to Sears, there just may not be a payment obligation right away.

The buyer also argues in their reply brief that the terms in the same and related agreement should be given the same meaning. But of course, the APA and the processing agreements are not in the same, nor are they even related agreements. In all the cases the buyer sites for that proposition are at opposite because they concern provisions that are in the same agreement or transactions that were intertwined or multiple contracts in a single transaction, so none of that case law is applicable here.

Similarly, the buyer's argument in their reply

that the processing agreements are integrated into the APA, (indiscernible) by the integration clause at 13.4 in the APA. The buyer also argues that the processing agreements were the backdrop against which the APA was drafted.

Accepting that premise as true for a moment, Your Honor, it's notable that not only are the reserve accounts not carved out from the APA's definition of credit card accounts receivable, but Section 2.10, which lists almost every conceivable type of security from restricted cash to letters of credit to utility deposits and everything in between. But what doesn't it include are reserve accounts held by the credit card companies.

Why is that? It's because they're already covered and included within the broad definition of credit card accounts receivable. And Your Honor, as we discussed in the last hearing, even if the reserve accounts are a type of restricted cash or other security or whatever buyer is arguing today about where it falls under 2.1, the APA's specific definition of credit card accounts receivable controls over that broad catch-all provision in 2.10 or even 2.1 (indiscernible).

And as I mentioned early -- earlier, what really matters is how the APA defines credit card accounts receivable and whether the reserve accounts are in fact credit card accounts receivable within the meaning of the

APA. And we submit that they are.

The APA defines credit card accounts receivable as each account together with its proceeds owed by the credit card payment processor to a seller, resulting from charges by a customer of a seller on credit cards that are processed by such a processor in connection with the sale of goods by a seller or services performed by a seller, in each case in ordinary course of that seller's business.

And unless you twist the words of the definition of credit card accounts receivable, these reserve accounts satisfy every element of that definition. The fact that as we've learned recently First Data has agreed to release $15 million of the $28 million that its holding in reserve accounts underscores our point that the reserve accounts are in fact owed, and that they're far more liquid than the buyer tried to portray.

Mr. Kamlani's latest declaration submitted with the reply brief candidly admits in Paragraph 5 that the reason First Data did not release the reserve accounts pre-closing to Sears is that ESL refused to provide the information that was requested. He then goes on to explain in the next paragraph that after the closing, when Transform did provide that information, First Data is not prepared to release $15 million.

So I want to stop there for a moment, because what

it demonstrates is that that money, at the time of closing, was available to be released. It was owed, it was ready to be released. All that had to happen was for ESL to provide the information that First Data was requesting, and then $15 million at that moment would have gone straight to debtors and be in their pockets right now. We wouldn't be having this issue.

But what ESL did was to say, "We refuse to give you the information right now." As Mr. Kamlani says in his declaration, they waited until after the closing and then they went and gave that information, and now the $15 million is available.

There also can be no dispute that had, following the sale hearing, the deal for some reason fallen apart and that there was no deal with ESL, and Sears had to go through a liquidation, the amount in those reserve accounts would have gone right to the debtors.

The agreements would have been done and save for any chargebacks, but you go into a going out of business deal, there are no returns. There aren't even any chargebacks. There's a lot of money flowing in. The reserves clearly would have gone to debtors because that money was always owed to debtors.

THE COURT: Well, can I -- I want to make sure I understand what you all are really fighting over,

practically. 10.9 of the APA is the provision that sets forth an aggregate amount of inventory value, amounts due to seller with respect to credit card accounts receivable, and pharmacy receivables, and says that it should be at least $1,657,000,000.

And then it says that to the extent that that amount -- the amount of those three items exceeds, $1,657,000,000, sellers may reduce such amount to be equal to that number by first transferring inventory and second retaining as an excluded asset, the oldest of any credit cards account receivable.

So that's a mechanism that comes into place that refers just to credit card accounts receivable, right? It doesn't have anything to deal with security deposits.

MR. FRIEDMANN: That's correct.

THE COURT: One can conclude, therefore I think, that if something is both a credit card account receivable and a security deposit, that paragraph would operate just fine. It doesn't matter whether a security deposit, you just use the paragraph because it all refers to accounts receivable.

MR. FRIEDMANN: That's correct, Your Honor.

THE COURT: Okay. Is there some other provision of the agreement that applies to require the security deposits to be held? In other words, are you saying that

you're entitled, the debtors are entitled to other money constituting credit card accounts receivable because it's not a security deposit? Or are we just arguing about the operation of 10.9?

MR. FRIEDMANN: What we're arguing about is the operation of 10.9, and I think the key factor here is whether or not those reserve accounts were considered part of the credit card receivables to get to the threshold.

THE COURT: I understand that. But in your explanation about they should pay us the $15 million now, I wanted to make sure I understood your basis for saying that.

MR. FRIEDMANN: Let me reclarify also that point, is that we do not dispute that what 10.9 entitles us to is the oldest of any credit card accounts receivable.

THE COURT: Okay.

MR. FRIEDMANN: So if Your Honor was to order than what we're entitled to is $14.6 million of the oldest credit card receivables, and that First Data should release $14.6 million of only the oldest credit card receivables to us, we have no issue with that.

THE COURT: Okay. So you're not arguing then that Transform is obligated to release all of the reserve amounts because they're credit card accounts receivable. You're not arguing that.

MR. FRIEDMANN: No, and there's a suggestion in

their brief that we're suggesting that the reserve accounts were not transferred or we were arguing they should not have been transferred. All of the security deposits, all of the accounts receivable, all of that went to Transform.

The point is that that in that happening, and in light of the fact that there also were pre-closing transactions that had not yet cleared, they ended up in excess of the $1.657 -- not only by the $7 million that was recognized at the closing which is why there was property, inventory transfer, but it ended up being an additional $14.6 million, as they learned about a week a later when all those credit card transactions had cleared.

THE COURT: Okay, all right. That's fine. I just wanted to make sure I understood the extent of your claim or your demand.

MR. FRIEDMANN: And the last point I wanted to make, Your Honor, was on this point exactly, which was that at the closing, Transform conceded that the debtors had met and exceeded this $1.657 billion threshold -- and that's demonstrated in the emails between counsel for debtors and ESL, which are attached to Mr. (indiscernible) declaration that we just put into evidence. It was only hours before closing the parties had agreed that debtors would be delivering in excess of $7 million above the aggregate threshold in 10.9.

And the email shows that the parties agreed at that point that at ESL's request, the debtors would take $7 million in prepaid inventory that was still at the vendor's facility instead of taking inventory that was already in transit. And my understanding is the reason for that swap was that the inventory already in transit could go towards the borrowing base, whereas the prepaid inventory that was still at the vendor could not.

So we agreed to accommodate them in order to get this deal to close at that point, but -- and first of all, the characterization by the way in the briefing that there was some threat made that they had to do this, that's just ridiculous. But it's also not the point.

The point is that there would be no $7 million in excess of inventory to be transferred unless the $1.657 threshold was met. And that threshold is met only if the reserve accounts were treated as part of the credit card accounts receivable in 10.9 by both parties.

Your Honor, in the end, you have before you an agreement whose terms are unambiguous. The definition of "credit card account receivable" is enough to clearly embrace the reserve accounts, even in the context of what we see in the proxy agreements. At the end of the day, this is about what the agreement says, not what ESL made, not which they had negotiated.

For that reason, we ask the court to enforce the automatic stay and order First Data to release, $14.6 million currently held in reserves to the buyer. I'm sorry, to the debtors. Thank you.

THE COURT: Okay.

MR. LIMAN: Your Honor, Lewis Liman for Transform. My colleague, (indiscernible), is prepared to answer briefly the questions with respect to cash in transit, if Your Honor has questions about that. The bottom line is we didn't know that that was on the agenda for today.

THE COURT: No, I just wanted to makes sure I understood it, because again, the issue about the automatic stay is a serious one, and I wanted to make sure Transform appreciates the difference between setting off a claim against another claim or withholding cash based on a claim setoff right, which would violate the automatic stay.

The difference of that concept from the concept of adjusting accounts through a reconciliation process, which is recoupment, which is not subject to the automatic stay. And if it's the former, we should stop it.

MR. LIMAN: Okay. We have serious quarrels with Mr. Friedmann's representations.

THE COURT: Okay, that's fine. We don't need to get into that today. I just wanted to give everyone a head's up on how I think that issue should be viewed as far

as the automatic stay is concerned.

MR. LIMAN: Your Honor, with respect to the credit card accounts receivable security deposit issue, we've got several points that we wanted to highlight. The first is that, you're quite correct, that the operative language to focus on is 10.9, which has two components as applicable here. One is that it has to be credit card accounts receivable, and second it has to be due.

Now from the beginning of this case -- and I mean from the beginning of this case -- there has been a distinction drawn between the notion of credit card accounts receivable payer to debtors and reserve accounts. And when I say, "from the beginning of this case," I'm referring to the first stay order that was entered in this case.

It's Docket 1394, which refers separately to the credit receivables payable to debtors, that's Paragraph 19, and to the reserve accounts maintained by the payment processors, and that's Paragraph 15. And that is obviously a backdrop against which this was drafted.

THE COURT: Why is that?

MR. LIMAN: Why is that? Because I think, Your Honor, the parties recognized from the very beginning -- and I'll get into the detail with respect to this -- that there's a difference between the amounts that were in the reserve accounts and the credit payables. Different rights

that the credit card processors had with respect to those funds.

THE COURT: Well the processes, I understand that issue.

MR. LIMAN: And that, I think, ultimately underlies a lot of the issues and a lot of the dispute between us. What I'd like to do -- should I ignore that?

THE COURT: Well, let's see if anyone answers that. I think that was just a glitch with the call.

MR. LIMAN: I'd like to focus on three or four elements of the contract. The first is the definition of "credit card accounts receivable." The second is the definition of "due," the third is the notion of payment. In order for something to be a credit card accounts receivable, there has to be at least two elements.

First of all, it has to be a payment intangible, and second, the payment intangible has to be owed as a result of card charges in the ordinary course. Now we've cited a case in our papers -- I noticed Mr. Friedmann did not respond to it -- that a reserve account, payments that are held in a reserve account, that were withheld from payments otherwise due, do not constitute a payment intangible.

The monies in essence of Sears of debtors that are held by the card companies as security. That's the

Morristown Lincoln case, it's not answered. The second element is these need to be a payment intangible --

THE COURT: Well, it says "account or payment intangible."

MR. LIMAN: That's correct, Your Honor. And the definition of "account," these would be an account under the UCC as between the card processing companies and the ultimate customers. So I think under the UCC, these would not fall within the definition of account. They -- the argument would be that they fall within the definition of payment intangibles, but monies that have been held back on behalf as security on behalf of another party are not payment intangibles.

THE COURT: Why isn't it an account? It's owed. They're holding it back because they have a right of set off, which means there's another obligation which they owe, which they're holding back to set off against.

MR. LIMAN: It's because it's cash that is held by the card processing companies in the form of cash. So that, I believe, under the UCC, would make it fall within the definition of payment intangible, if anything. I do want to focus though on the language about owed as a result of card charges in the ordinary course. And I also want to focus on the language of the card agreements.

Now Mr. Friedmann told you, and his briefs say,

that you should not look at the card agreements for their definitions. I'd like to cite a couple of cases to you and propositions that demonstrate that that's wrong. It's the restatement of contracts 214 says that when you have related contracts and you're trying to interpret a term, you look to those related contracts. And after all, what we're trying to figure out here is whether these monies that are, that are held by First Data, AmEx and Discover, in each instance fall within credit card accounts receivable.

The other case I'd like to cite to you is the Shiftan case, Delaware 57.935, Note 15. If you look, just for example, and parse carefully the language of the First Data agreement, that tells you what is payable from card transactions in the ordinary course. The language almost tracks the language that is in the APA. It refers to sales data that come from card transactions in the ordinary course.

And remember, ordinary course in the APA in this instance is used in the lower case, not the formal upper case, so it's got to be referring to something. Our view is that it best refers to that language in First Data and in the other agreements.

And then it tells you what is payable out of those card transactions in the ordinary course. And what it tells you is payable is a net amount. It's not just monies that

were furnished as a result of card transactions at the Sears stores. The amount that is payable is an amount that is net of reserve account amounts.

Now, the debtors would say, well the title, you should disregard the title of credit card accounts receivable because receivable and payable are not referred to within the definition. But they also within the papers say that the word “owed” equals payable. That’s their Paragraph 18.

And we would respectfully submit that in order to determine what is payable, or what was receivable out of card transactions in the ordinary course, you don’t need to go beyond the First Data agreement at Paragraph 4.3 and the other related provisions.

Now, Mr. Friedmann also told you that reserve is not mentioned within the APA, but he has no answer to the fact that security is referenced within the APA. The reserve is simply the account in which the asset is being held. There’s no -- it shouldn’t be a surprise that reserve is not being mentioned. The issue before Your Honor is what to do and how to characterize that cash in the moment of closing in the hands of the debtor.

And when the agreements before you refer in the instance of First Data to an amount that is held for protection against the risk of default, when they refer to

in the AmEx agreement as an amount that is collateral, when they refer to in the Discover agreement as security, and in the Discover agreement -- and I do have a correction I need to make from my argument last time -- the Discover agreement makes it quite clear that there is a security interest that Discover has in these funds.

The correction that I have to make is that I fear that I may have been misunderstood to suggest that the card processing companies don't have a security interest in these funds. I think they do, and I think what you need to do is look at the UCC paragraphs or sections 3.12 to 3.14. It says that when the funds are in the possession of the card companies, that gives them a security interest without the need for perfecting. I've got two more points I'd like to make --

THE COURT: But they weren't granted a lien. They have a right of setoff.

MR. LIMAN: They have a right of setoff. Under the UCC, they've got -- they don't need to -- and right of setoff actually is quite important, and I want to get back to that in a moment. They don't need to have perfected their filing --

THE COURT: No, but that's a different point. That's perfection as opposed to a lien. And I think what they have is a right of setoff, i.e., they owe Sears money,

which they have a right to offset against.

MR. LIMAN: That's correct, Your Honor. Now there are two additional points that I want to make with respect to just the definition of credit card accounts receivable. The first is that when you look at the argument in the definition that the debtors urge you to apply, which is to say that the funds that were used to satisfy the reserve obligation were generated from credit card receipts. As we've pointed out, there is no limiting principle with respect to that argument.

THE COURT: I don't understand.

MR. LIMAN: Well the point, Your Honor, is that in each instance, Sears had an option when the card companies said in order to continue to do business with us, we need you to post security. Until First Data -- what First Data said is you need to post a letter of credit. You've got an option if you don't want to post a letter of credit to post cash or to permit us to withhold. Similar mechanisms under the AmEx agreement and under the Discover agreement. I don't think there would be any dispute if the debtors here, Sears chose pre-petition to deposit cash with the card companies. That money would not constitute a credit card account receivable. That money would be derived from credit card transactions, and that's where Sears' money came from. It's a retail business. Its revenues are all derived from

there.

THE COURT: But the parties actually use the term "credit card accounts receivable." They didn't use the term "cash." And that's the term that's used in 10.9.

MR. LIMAN: They did not --

THE COURT: I mean, I guess this is my ultimate point. Why can't something be both a credit card account receivable and a security.

MR. LIMAN: Your Honor, if you look at -- because under 2.1D, we got the right to all of the acquired receivables. And under 2.1P2, all of the security deposits, free and clear.

THE COURT: Subject to 10.9. 10.9 doesn't take those asway, it just says if the aggregate amount of the three items listed in 10.9, including Item 2 of those 3, the credit card accounts receivables exceeds $1 billion, $600 and some thousand, million dollars, then the debtors can take from the bottom, from the oldest credit card accounts receivable. It doesn't take away what the debtors sold. It just says that the debtors actually sell more than the billion six, they get this adjustment.

MR. LIMAN: There are two reasons, two other reasons why they can't on these facts be both. One reason is that what these funds on the facts of these agreements, what these funds were doing was securing obligations of

Sears. And so they were not, in fact, payable to Sears. There was no obligation to pay these --

THE COURT: It doesn't say "payable," it says "owed." It says "owed by." And that's what a setoff is. That's the underlying right to the -- that's the applicable language in 2.10, setoff.

MR. LIMAN: Your Honor, I don't think there's any dispute that "owed" also is a synonym for "is payable."

THE COURT: Then they would have used the word "payable" instead of "owed." One is present, and one is both present and future.

MR. LIMAN: But one of them is also has to be derived, and this is the key language, that debt that is owed has to be from the credit card transactions. It can't -- in these instances, that debt is not owed as a result of the credit card transactions.

THE COURT: Well how did -- I'm sorry, can we just go through 1.1. Each account, or credit card receivable, each account or payment intangible, each is defined in the UCC, together with all income, payments, and proceeds thereof owed, right, credit card payment processor, or an issuer of credit cards to a seller, resulting from charges by a customer of the seller on credit cards processed by such processor or issued by such issuer in connection with the sale of goods by a seller or service performed by a

seller in each case in the ordinary course of business.

So as I read the agreements, the credit card processor agreements, they get the payments by the purchasers, based on the processor or issuer being paid in the ordinary course. And they owe that money to the debtor, but they have the right to hold as a basis of setoff as against a reserve.

So I mean, again, this agreement -- and we clarified this when I was here for the debtor's counsel -- does not require the buyer to pay over the amount that's being held, but it does, I think, require the buyer to pay over effectively or not buy anything above the billion 657 in the form of the oldest credit card accounts receivable.

So it's just a business deal, that that was the receivable. And it seems to me that these are credit card accounts receivable -- I can't imagine that they aren't. It's not -- that's the basis for the relationship. There's no separate lien, it's just an offset.

MR. LIMAN: Your Honor, let me put it this way. Let's imagine a different world in which First Data had filed for bankruptcy. And First Data -- and the question was what is the character of those funds that were held by First Data. Remember, they're held in a separate account. Only First Data gets access to those accounts. It's a separate account that is funded.

Now in that alternative world, there will be two questions. If it's an accounts receivable, then my understanding is that that -- that Sears would be a general unsecured creditor, just entitled to be paid on those accounts receivable. I don't think that that is the argument that Sears would be making in that instance.

What Sears would be saying -- and they would be correct -- is that the money in the reserve changed character once it was withheld from the accounts payable and used to satisfy their obligation under the agreement. What they would be saying in that instance is that they've got an interest in those funds.

THE COURT: Who does?

MR. LIMAN: Sears would be saying that. And there's a case that I would cite, Your Honor, with respect to that very proposition. It's the Ionosphere case, 177 Bankruptcy 198. That's what Sears would be saying. And what First Data would be saying is that by virtue of their possession of those monies that belong to Sears, they've got a security interest. Now, if you look at the --

THE COURT: No, there's no grant of a lien. They would say they have a -- they would say they have a secured claim because of a right of setoff, a contractual right of setoff.

MR. LIMAN: And that would distinguish this from a

accounts receivable.

THE COURT: But the basis for the setoff is that one party owes another party, and that party owes the other party. They both owe each other, so it is an account.

MR. LIMAN: But let's take the American Express Reserve for an example. American Express Reserve, those funds are held --

THE COURT: Can I interrupt you for a second, sir? The UCC definition of account means "a right to payment of a monetary obligation, whether or not earned by performance." And it includes, among other things, "arising out of the use of a credit or charge card." So why isn't this a monetary obligation arising out of the use of a charge card owed by the processor, which however, the parties have agreed can be held based on a right to setoff.

MR. LIMAN: Your Honor --

THE COURT: So it's an account obligation. It's two mutual obligations.

MR. LIMAN: Your Honor, there's commentary onto the UCC, and I can provide you cases. I don't have them right here at the (indiscernible), but I'd be happy to provide them this afternoon, that says that that language from card transactions refers to the obligation between the card company and the ultimate customer.

THE COURT: Fine, but it's a right to payment, and

that's what Sears has. It has a right to payment. It's not earned yet. I'm sorry -- it's not payable yet, but it has a right to payment.

MR. LIMAN: Your Honor, but let's just pass for the moment the question of whether these are payment intangibles or accounts.

THE COURT: Okay.

MR. LIMAN: They do need to result -- whether they're accounts or payment intangibles, they're an obligation. That's what unites payment intangibles and accounts. They're obligations. The question that the rest of the definition addresses is what is that obligation derived from. It's not how is that obligation satisfied, it is what is that obligation derived from.

THE COURT: Well, it's --

MR. LIMAN: That I think is the best --

THE COURT: All right, but I think you're arguing that it is not an obligation owed by a credit card payment processor resulting from charges by a customer of the seller on credit cards processed by such processor.

MR. LIMAN: In the ordinary course.

THE COURT: In each course, the ordinary course. But these were credit cards. The customers use them in the ordinary course. The obligation was charged in the ordinary course. And this agreement in each case lays out the

obligation of the credit card processor to pay the amounts over, except there's a reserve based on a right of setoff. But if it's --

MR. LIMAN: Your Honor --

THE COURT: To me, it sounds like a credit card account receivable.

MR. LIMAN: I do want to make sure I address my other two arguments. I just want to make one more point with respect to this. When you look at the nature of the obligation, I think it is important to look at what triggers the obligation to pay. In the case of credit card accounts receivable, in the ordinary course there's a period of days that come, and after those periods of days, you have to pay.

THE COURT: Right. I think our difference here really stems ultimately from your view that the word "owed" means payable.

MR. LIMAN: I don't think so, Your Honor.

THE COURT: Well, I mean to say that it's an obligation to pay. Clearly the credit card processor has an obligation to pay eventually if it turns out that the reserve is not required.

MR. LIMAN: That's not our position. That's not our position. Our position is not that these have to be immediately payable. Our position with respect to the definition of credit card accounts receivable is that the

obligation that was triggered that gave rise to the need to put those monies with the card companies has to have been triggered from card transactions in the ordinary course.

It can't be that it was triggered by the fact that in the past there were card transactions. There was a lingering liability. That's the facts here. There's a lingering liability. The company is in financial strain, financial distress that reserve accounts --

THE COURT: But there's nothing in the credit card agreements dealing with the company being in financial distress. This is an ordinary course arrangement. They always have the reserve.

MR. LIMAN: That's not true, Your Honor. That's not true.

THE COURT: Well the agreements don't speak about financial distress.

MR. LIMAN: They do. If you look at 4.7 of the First Data agreement. I want to be careful about using the precise language because it's confidential. But you will see that there's a trigger there that refers to the revolving credit facility.

THE COURT: But is there anything in the record to suggest that this money was withheld on that basis as opposed to on the basis of all the other language that lets them create a reserve because of a concern about --

MR. LIMAN: Yes, Your Honor. I'm glad you asked that question. If you were to look at the Rolacheck affidavit, Exhibit B, it tells you why that reserve account was triggered.

THE COURT: Well, I'm sorry -- when you say triggered --

MR. LIMAN: Why the obligation was created to put funds in that reserve. It's not the point within 4.4, which is what the debtors had cited to you. The provision that First Data invokes, Section 4.7. And the only triggering condition under 4.7 is the provision with respect to the revolving credit facility.

THE COURT: Okay.

MR. LIMAN: And Your Honor, I would understand your argument if the card companies invoked separate provisions that exist under each of the agreements for delayed accounts payable. They did not trigger to invoke those here. Let me just address briefly two other, we think, dispositive points that I don't think are answered. And that I think there's been some confusion about.

THE COURT: Okay.

MR. LIMAN: The first is with respect to whether these count against the 10.9 path. And if you read that provision carefully as it was written, it has two elements. One is that it has to be credit card accounts receivable,

and the second is due to sellers. That's the language of 10.9.

Now my colleague would have you either say that due to seller means immediately payable and would caricature our argument. And again, that is not our argument. Or they would say that that language is just surplusage and means the same thing as owed, and that's contrary to principles of contract interpretation. It's also contrary to the purpose of the provision and contrary to the APA itself.

And I'd like to cite a couple of things to Your Honor. The first in terms of how that language of due is used in the APA, the drafters were quite careful to draw distinctions between things that would be due or would become due. You can look at the definition of "liability" under the APA.

You can also look at 2.3K little 1, which talks about obligations that transforms obligation to pay liabilities as they become due in the ordinary course. If there was an intent here to pick up things that would become due in the ordinary course, that could be -- it could be drafted that way.

So there could be an obligation that can become payable in the future that is not currently due. And for that -- and the definition that the case law gives to that is to say that you have an amount is due when there is a

fixed, settled obligation. It's in re: Hamilton Krieg, 143 F3rd, 1381; in re: Rubina Metro, 522 Bankruptcy 656; and Black's Law Dictionary definition of "due."

And Your Honor, I think that language is critically important. First, it corresponds to what is in fact payable under the card agreements. In each of the instances of card agreements, it refers to two separate potential sums of money. One is the sums of money that are payable on the regular schedule three days, four days, five days after the sales data is submitted. There's no question here that those would be credit card accounts receivable, that even if they were not immediately payable, would count against the 10.9 cap.

There is the separate provision -- and here Mr. Friedmann, I think, made some critical concessions that are the sums that are held in the reserve accounts. Those numbers first of all, you heard him say, we don't know what they are. They're going to be the amount that's in the reserve less what the obligations are from chargebacks.

And if you look at the agreements themselves, in terms of when if ever they would become payable or there would be an immediately enforceable right, is entirely unclear. What is clear is that there was no immediately enforceable right at the time of the closing to the return of those monies.

In each instance, it had to be that there was trigger conditions that were satisfied that had not been satisfied, and as to which there was no date certain. Now, they misquoted Mr. Kamlani from his declaration. I assume you've got the declaration in front of you. I'm not going to just repeat that. I do want to address --

THE COURT: Well how did they misquote him?

MR. LIMAN: They misquote him by saying that those monies would have been -- if we had only delivered Transform's financial condition and information about what Transform's condition would look like post-closing, then First Data would have released all of the reserves, including the oldest of the reserves.

If you look at the letter from First Data and the email that they quote, that's not what First Data says. And if you look at Mr. Kamlani's declaration, even today after we've provided that information, it's not the position that First Data and the others have taken. Their position is that they still have the right to a reserve, and we have no entitlement to get any of that money back.

They're willing to put some, not released to us, in reserve. But they're not resisting the notion that we have a current entitlement to it. That's -- now, I don't think that that is particularly here or there with respect to what the communications were. We plainly didn't have an

obligation to turn over business information to First Data. First Data still has not agreed to the turnover. I do think that there's one other -- two other critical points.

THE COURT: Did they assign the First Data agreements to transform?

MR. LIMAN: The debtors did assign the First Data agreements to Transform, pursuant to the APA, the moment that the transaction closed, those agreements were assigned to us and we've exercised the right to assume those. And those agreements have been assumed (indiscernible), with all of the duties and rights that go with them.

And they were at the time the transaction closed, we were delivered a schedule. That schedule had listed on them the reserves. We believe that the reserves were being delivered to us. There was no effort made to hold back on any of the reserves. And that's what happened at the moment of closing. There was a dispute over the $7 million.

You've seen the different parties' views with respect to that. Our view that we were threatened. They say that they've got a different view. We think our facts would be right. The point is that the moment that an agreement was reached with respect to that $7 million, we thought they had every expectation to believe that those contracts with each of the card companies were our contracts that were assigned to us. And when we assume them, we had

the right to assume them.

From the card companies' perspective, which I think is also recorded, to look at from this perspective, the card companies also had the right to assume that when they decided not to object to the APA because there were reserves there, that those reserves would be kept in place.

Mr. Friedmann has said that all you have to do is order First Data to release the reserves. I don't think that that is what First Data had in mind at the time of the sale hearing, and I don't think that that's what the APA has in mind.

THE COURT: Well, First Data hasn't taken a position here though, right?

MR. LIMAN: I think this is the first time that we've heard the debtors say that Your Honor should enter an order requiring them to turn over the reserves. They've been very unclear about exactly the type of relief that they're seeking. In our mind, the only relief --

THE COURT: Well they -- okay, there's this dispute as to whether they're prepared to turn them over.

MR. LIMAN: I don't think there's even a dispute as to whether they're prepared to release them.

THE COURT: Well ultimately, the purpose of the reserve is to protect them against returns and chargebacks. Once they figure out that there aren't any returns or

chargebacks, there's no reason to hold it.

MR. LIMAN: Well Your Honor, imagine the hypothetical that you would have to engage in to figure out what the true amount of that -- those receivables looked like at the time of closing.

THE COURT: I'm sure they have records to show that. They processed the cards.

MR. LIMAN: I don't think so, Your Honor, because you'd have to figure out which chargebacks are associated with which transactions, going back in time to figure out --

THE COURT: But that's what you do.

MR. LIMAN: No, no, Your Honor. You don't always link it to a particular transaction in order to figure it -- to do the tracing exercise. This money exists to satisfy the chargebacks, whether those chargebacks are pre-closing chargebacks, which are their liabilities, or chargebacks as a result of post-transactions, which --

THE COURT: Right, but you can tell which is which. You could tell what's pre and what's post.

MR. LIMAN: I don't know that you can in order to figure out what the --

THE COURT: Well then, they're not really doing their job, because they have to keep records and they have to know what they're doing. I guess it's conceivable they don't know, but then I don't know how they file proofs of

claim and assert rights to collect.

MR. LIMAN: They've got that reserved, but in any event, the number's not going to be the $14 million or whatever. It's going to be a number net of the chargebacks that would be associated with card transactions up until the moment of sale. And that I think is a reason why this is fairly considered to be a contingent claim and not a sum that is due knowing.

I do want to mention the notion that these have to be -- that they have to have taken an action to retain the cards, to come back to us of February 22nd and say the reserves belong to us. I think it's just not the notion that is contemplated by the APA. They say, well it's estate property, so it will --

THE COURT: But this is not, again, I think we clarified this -- the debtors are not saying that the reserve account needs to be turned over. This is a crediting mechanism under 10.9 of the APA. The reserve stays where it is. It gets out as it gets worked out. But the crediting mechanism is the only thing that this relates to, under 10.9.

MR. LIMAN: Your Honor, if I understand the point correctly, we would agree that the most that the creditors -- sorry, the debtors would get is that if First Data, which has the oldest of the reserves, agrees to release those

oldest of the reserves to us, then we have an obligation to turn them over.

THE COURT: No, that's not what that -- I don't think -- I mean, that's what I spent a few minutes with the debtor's counsel on. 10.9 says that the amount over $1.657 billion goes to the debtor in the form of the two abilities of the debtor to use the assets. And one of them is the oldest credit card accounts receivables. Not reserve, but the receivables, the oldest ones.

MR. LIMAN: They get the right to retain --

THE COURT: So you all pay it over, because you've gotten them.

MR. LIMAN: No, we haven't gotten them. We don't have them.

THE COURT: But it's over -- it doesn't matter whether you've gotten them or not. If the defined term is over $1.657 billion, then there's this purchase price adjustment.

MR. LIMAN: But no, that's not the -- the most that they would get -- assume that these were 360-day-old receivables, right? They're 360-day-old receivables. When we -- a year after the closing, we get paid those -- some portion of those receivables.

THE COURT: Right.

MR. LIMAN: Maybe we don't get paid any of them.

THE COURT: I agree with that. That's what they're entitled to, which explains why this isn't such a big deal as far as transforms credit and everything else, because the reserve is still there. They negotiated a pretty good deal in 10.9 for themselves, which is that the amount above $1.657 billion, the debtor is entitled to, but it gets it in the two limited ways that that section provides, which are first, transferring inventory that would otherwise be acquired inventory, to a GLB-leased store or a GLB-owned story.

And second, retaining as an excluded asset the oldest of any credit card accounts receivable, which you can do as a book adjustment as part of the reconciliation process of the purchase price. So it's not depriving Transform of some sort of its benefit of this security deposit. It's a purchase price adjustment where the purchase price adjustment comes in those two forms in that order.

MR. LIMAN: If I understand Your Honor correctly, the inventory's all resolved, and that with respect to the security deposit, it would be an obligation running from us to them once that security deposit is -- those funds are released.

THE COURT: No, it's just -- you just credit back to them the amount on the oldest credit card accounts

receivable.

MR. LIMAN: Once we receive it.

THE COURT: No, as part of the purchase price.

MR. LIMAN: But it's not -- that's cash out to us. And that's exactly what this was designed not to do.

THE COURT: Well, then --

MR. LIMAN: I mean, they get the --

THE COURT: No one has briefed that issue. But that seems to be the only right that they have is to get that provision enforced. I agree with you, it's not to turn over the money in the reserve account.

MR. LIMAN: It's not to turn it over, and I think we have briefed, and I don't think there's any dispute with it, that the most that they would get is the contingent right that if we recover, they recover.

THE COURT: Well, I think it's a purchase price adjustment. I don't know how that's made, but that's a separate issue.

MR. LIMAN: But it's not designed as a purchase price adjustment. It's not designed as a purchase price adjustment. And I think -- and I may be overstaying my welcome here, and I apologize if I am, but I think in order to give -- the three points I want to leave you with --

THE COURT: Well, it's just transferring. You're right. Well it says "retaining," "retaining as an excluded

asset." I guess colloquially, that to me would be a purchase price adjustment. They're not selling you those old receivables. They retain it.

MR. LIMAN: What they would have had to have done is at the time of closing and before we exercised assumption rights, they would have had to have said something to indicate that they were holding back on it. Just like, Your Honor, if you read the provision with respect to the inventory, what that says is at the time of closing, they need to do something with respect to inventory.

We're going -- we're an operating business. To say to us a week and a half after closing, we're retaining something, then we already have a right to assume --

THE COURT: Well, but you don't know all the credit card accounts receivables at the closing. You just told me they can't figure it out as of today, what's pre and post.

MR. LIMAN: They could make the claim as to --

THE COURT: Why do they have to? It's right in the APA.

MR. LIMAN: Because what it says in the APA is they have to retain it. They have to retain it. They didn't do anything --

THE COURT: They don't have to. It's in the APA. It's (indiscernible). I think this one you're not going to

convince me on. I mean, it's not something you know at the closing.

MR. LIMAN: Your Honor, I would urge you to look closely at the language of the card agreement. I do think under the restatement and under the integration clause, they're part of the agreement, I think they define what is payable in the ordinary course and what's receivable in the ordinary course.

I do think you have to give independent meaning to the notion of "due." I think that does have the meaning of law that says that it is immediately enforceable, it has to be a fixed obligation. It doesn't have to be payable immediately. It can be payable in 20 days, 30 days. It has to be a fixed obligation. And I think their argument fails on those grounds.

THE COURT: Okay, thanks.

MR. LIMAN: Thank you, Your Honor.

MR. FRIEDMANN: Your Honor, if I may just quickly respond and clarify to a couple of the points. First of all, Mr. Liman pointed to the Morrison Lincoln Mercury and said we had no answer and, as we all know, lawyers hate to be told they have no answer so we have an answer which I have to give now.

They're pointing to this Eastern District Tennessee case from 1983, which applied completely different

facts, a totally different law in determining whether or not a reserve account fell under the definition of account under the UCC.

The Delaware UCC applicable here, as you pointed out, defines account as a right to payment of a monetary obligation arising out of the use of credit or charge card. The reserve accounts here clearly represent a right to payment of monetary obligations and, under the definition of the credit card accounts receivable, the key is that these are accounts and the proceeds thereof resulting from those charges. I don't really see how that's a disputable point.

The second point I wanted to make is that the withholding of these credit card receivables in reserve accounts does not change the fundamental character of those proceeds. They continue to be credit card transaction proceeds that were now withheld. They were not converted and they ultimately and at all times were owed to Sears.

The third point is Mr. Liman was making much of the term "due" in 10.9, but kept inserting the word "immediately". It doesn't say immediately due, it just says due. Due and owed are synonyms. If it said immediately due that might be a different story. That would tie closer to their notion of it being payable, but it just says due.

The final thing I just want to clarify in terms of the relief we're seeking here, Your Honor is exactly right

and what the mechanisms are after the fact are different, but we're looking to demonstrate that credit card accounts receivable includes the reserve accounts and that therefore there's a credit due to the debtors of $4.6 million.

THE COURT: What is your response to Mr. Liman's argument that because -- well first of all, let me ask you this question. Is the money at issue here held exclusively by First Data or are there other ones too that are holding it?

MR. FRIEDMANN: So there are reserves that are held by the other credit card processors as well. My understanding is that First Data is holding approximately $28 million and change and then the other credit card processors have some smaller amounts.

In terms of determining what the oldest are, my understanding is the oldest $13.3 million, if my number is right, are with First Data. You would then need to go one of the other credit card processors if you're looking for the oldest to get the next whatever that is --

THE COURT: All right.

MR. FRIEDMANN: One point whatever million.

THE COURT: So, Mr. Liman's argument is that the definition of credit card account receivable ends with the clause in each case in the ordinary course of business and his argument is that the reserve established by First Data

was not in the ordinary course of business because it was premised upon a more recent fact, which was the lack of availability of the revolving credit facility in this specific amount or higher.

So, what is your response to that argument? This isn't in the ordinary course, this deposit.

MR. FRIEDMANN: This is something that we addressed in our brief and I think the key here is the term in each case in the ordinary course of its business, what is that modifying? And what it's modifying is the clause that directly precedes it, which is in connection with the sale of goods by a seller or services performed by a seller in each case in the ordinary course.

It's describing how these charges came to be that the credit card processor had. So, they're owed --

THE COURT: So you're applying the last antecedent rule.

MR. FRIEDMANN: Correct.

THE COURT: Okay. It doesn't have to be owed by the credit card processor in the ordinary course.

MR. FRIEDMANN: It's not owed in the ordinary course. It's owed from proceeds resulting from credit card charges and then the key is that those credit card charges were from the sale of goods or the services performed by the seller in the ordinary course of seller's business.

THE COURT: Okay.

MR. FRIEDMANN: Thank you, Your Honor.

THE COURT: How do you envision this working in practice? You're saying you're above the $1.657 billion cap right now or amount right now, right?

MR. FRIEDMANN: That's correct. My $14.6 million.

THE COURT: Right. Is that it or will there be additional amounts beyond that or is this just based on the reserves that you have now? We know what the reserves are.

MR. FRIEDMANN: Based on our understanding, based on the aggregate threshold in 10.9, the $14.6 is the total amount that we were above.

THE COURT: Okay. So then what happens? Because we clarified it's not necessarily to have the reserve released, it's just that you're entitled to the excluded assets or the other assets.

MR. FRIEDMANN: To be honest, I think the debtors at this point are flexible in terms of how we get the $14.6 million. If they want to write a check for $14.6 million, that works. If it's --

THE COURT: Or it's between you and the --

MR. FRIEDMANN: -- us and First Data and whoever other credit card processors --

THE COURT: Or whoever has the oldest one.

MR. FRIEDMANN: Correct.

THE COURT: And if they still have a right to hold it because of their right, you can contest that.

MR. FRIEDMANN: That's something we'd have to work out between us and the credit card processor.

THE COURT: All right.

MR. FRIEDMANN: I'm sorry, I stand corrected. The $7 million that we've been referring to where at the time of closing there was this identified $7 million overage, that was before we knew about the additional credit card proceeds.

THE COURT: Right.

MR. FRIEDMANN: As I mentioned, the $7 million, the deal that was agreed to was rather than taking the inventory in transit, we instead agreed to take inventory that was still with the vendor and that was supposed to be shipped to the going out of business stores.

That truck has not arrived yet, Your Honor. I don't know how much traffic there was between the vendors and the going out of business stores, but we have not gotten that $7 million worth of inventory either. So, it's really $14.6 million of credit card (indiscernible) plus that $7 million in inventory.

THE COURT: Okay.

MR. LIMAN: Your Honor, if I could just respond to that last point. My understanding is that the debtors have

never given any instruction to the vendors with respect to it.

THE COURT: On where that's supposed to go?

MR. LIMAN: As to where it's supposed to go. The first we heard of a complaint with respect to that was in their papers and I think they, frankly, have -- I understand we've got a lot of balls in the air. This one looks to me that they've dropped.

I think, Your Honor, has the point with the $15 million that First Data has agreed to put in escrow. It's not the oldest of the reserves.

THE COURT: Right. Okay. All right. I have before me the motion by the debtors in this case to compel turnover of estate property under Section 542 of the Bankruptcy Code. At issue in the motion is the interpretation and application of the asset purchase agreement between the debtors and Transform Hold Co. More specifically, for purposes of this hearing, this ruling without ignoring the rest of the motion which the parties seem to be working through, whether certain reserves held by credit card processing companies constitute credit card accounts receivable, or CCAR, as defined in the asset purchase agreement, of APA, and, in addition, whether if they do in fact constitute credit card accounts receivable, whether Section 10.9 of the APA has been triggered or not,

which involves I believe as a contested basis only the issue of whether such credit card accounts receivable and "due" to the seller, i.e., the debtors.

I believe that this issue can and should be decided based on the plain meaning of the asset purchase agreement pursuant to APA Section 13.8, the laws of the State of Delaware govern the agreement and construction of contract language under Delaware law is a question of law. Rhone-Poulenc company v. American Motorist Insurance Company, 616 A.2d 1192, 1195, (Del. 1992). The primary consideration in interpreting contract is "to attempt to fulfill to the extent possible the reasonable shared expectations of the parties at the time they contracted."

Comrie v. Enterasys Networks Inc., 837 A.2d 1, 13 (Del. Ch. 2013) where contract language is clear and unambiguous, under Delaware law the ordinary and usual meaning of the chosen words will generally establish the parties' intent, Matthew v. Laudamiel, 2012 WL 2508572 at page 5 (Del. Ch. June 29, 2012).

Courts must be circumspect when considering a contract's language, especially when the contract is between sophisticated commercial entities. Creating ambiguity and ambiguity where none exists could in effect create a new contract with rights, liabilities and duties to which the parties have not assented. Cypress Semiconductor Corp. v

SVTC Technologies., LLC, 2012 WL 2989169 at page 4, Del.Super., 2012 June 29, 2012, O'Brien v. Progressive Northern Insurance Company, 785 A.2d 281-288 (Del. 2001).

An ambiguity exists when the provisions in controversy are fairly susceptible to or of different interpretations or may have two or more different meanings, GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P. 36 A.3d 776, (Del.Supr., January 03, 2012).

Contract language is not ambiguous merely because the parties dispute what it means, Alta Berkeley VI C.V. v. Omneon, Inc., 41 A.3d 381 (Del.Supr., 2012, March 05, 2012).

Delaware adheres to the objective theory of contracts under which a contract is construed as it would be understood by an objective reasonable party.

The Court, of course, should not interpret a contract provision to yield an asserted result or a result that would render other provisions null, Martin Marietta Materials Inc., v. Vulcan Materials Company 2012 WL 2819464 (Del.Supr., May 14, 2012). See also GMG Capital Investments, 36 A.3d 779.

But again, based on my review of the parties' agreement, I do not believe that I need to look at parol evidence and that the clear and unambiguous ordinary usual meaning of the words chosen by the parties in their context should govern.

APA Section 1.1 defines credit card accounts receivables, "Each Account or Payment Intangible each as defined in the UCC together with all income payments and proceeds that are owed by a credit card payment processor or an issuer of credit cards to a seller", the seller meaning the debtors, "resulting from charges by a customer of the seller on credit cards processed by such processor or issued by such issuer in connection with the sale of goods by a seller of services performed by a seller in each case in the ordinary course of its business."

This term becomes relevant for purposes of this dispute because Section 10.9 of the APA entitled Inventory and Receivables provides the following; "The aggregate amount of 1) the inventory value of the acquired inventory, excluding any pending inventories, 2) the amount due to seller in respect to a) the credit card accounts receivable and 3) pharmacy receivables shall be at least $1.657 billion. To the extent that the aggregate amount of items 1 through 3 in the foregoing sentence exceeds $1.657 billion on the closing date, the sellers may reduce such amount to be equal to $1.657 billion by first, transferring at sellers' expense and in consultation with buyer inventory that would otherwise be acquired inventory to a GOB leased store or a GOB owned store or any other location designated by sellers that is not a property, until the inventory value

of the acquired inventory is equal to $1.553 billion and second, retaining as an excluded asset, that is an asset not purchased by the buyer, the oldest of any credit card accounts receivable or pharmacy receivables."

I believe it is undisputed that the $1.657 billion threshold in Section 10.9 has been met and that there are disputed assets, disputed in the sense that there are credit card accounts receivable were not in excess of that number, the debtors therefore contend that the excess oldest coming first should be treated as an excluded asset and not part of the assets purchased by Transform Hold Co.

Transform Hold Co disputes this provision or this interpretation on two grounds. First, it contends that the disputed credit card accounts receivable are not credit card accounts receivable, but are instead covered by a different definition in the APA, namely the definition of a security deposit, which is found in APA Section 2.1(o).

That section defines a security deposit as, "Any and all rights to sellers in and to any restricted cash, security deposits, letters of credit, escrow deposits and cash collateral, including cash collateral given to obtain or maintain letters of credit and cash drawn or paid on letters of credit, utility deposits, performance, payment of surety bonds, credits, allowance, prepaid rent or other assets, charges, setoffs, prepaid expenses, other prepaid

items and other security, collectively security deposits, together with all contracts, agreements or documents evidencing or related to the same in each case to the extent related to any acquired asset."

There is another potential definition that would apply to the disputed credit card accounts receivable here, which is the APA's definition of claim as all rights to payment, which then tracks the Bankruptcy Code definition in 1015.

I have now had the chance to review all of the credit card servicing agreements under which the disputed credit card accounts receivable are governed and pursuant to which those amounts are being held by the credit card servicers.

Those agreements are filed under seal and I will resist quoting extensively from them. Instead I will note merely that based on my review of each of them, including the First Data, AmEx and Discover agreements, there is a common thread whereby each processor or servicer owes or has an obligation to pay the Debtor and in one case aptly is described as a provisional credit for all of the proceeds of the credit card transactions at the Debtors' stores or otherwise with the Debtor.

But has the right to setup a reserve account for chargebacks, credits or adjustments, current or anticipated

card organization fees or fines in the amount of any fees or discounts due. There is no formal security agreement language in these contracts, but they each recognize that the basis for such reserve amounts ultimately relies upon the right of setoff and/or recoupment.

As I previously quoted, a right of setoff is one of the rights that falls within the definition of security deposit and I conclude that accordingly the funds being held legitimately and there's been no dispute that they have been illegitimately held by the credit card processors under their respective reserve right agreements, would constitute security deposits as a defined term under Section 2.1(o) of the APA.

Again, the fundamental point being that they're being held pursuant to a right of setoff recognizing that, to the extent that there are no amounts owed over by Sears in the nature of chargebacks, adjustments, fees and the like, they would be owed by the credit card processors to the debtors.

My conclusion that the money at issue here constitutes a security deposit does not however lead me to conclude that it is not also a credit card accounts receivable. There is no carveout in the definition of credit card accounts receivable for security deposits and the fact that it would be covered by the defined term

security deposit, does not also mean that it wouldn't be covered by the term credit card accounts receivable.

That is particularly the case given that the only operative provision we're focusing on here as far as the underlying dispute is 10.9, which itself does not make the distinction or any distinction between credit card accounts receivable and security deposits.

So, I believe that having now read all of the relevant provisions of the credit card processing agreement, the argument by Transform Hold Co that the money at issue is a security deposit is a red herring.

That still leaves the issue of whether the money does fall within the definition of credit card accounts receivable. Having carefully considered the parties' arguments and reviewed the applicable provisions in the context of the entire agreement, I conclude that the funds at issue are credit card accounts receivable within the meaning of APA Section 1.1.

I believe that under the parties' own definition, this money does in fact constitute an account for purposes of the UCC as well as a payment intangible. Delaware's version of the UCC provides in Section 9.1022 that an account means a right to payment of a monetary obligation, whether or not earned by performance.

It includes, among other things, in (g) arising

out of the use of a credit or charge card or information contained on or for use within the card.

Payment intangible in Section 61 of that section of the Delaware UCC means a general intangible under which the account debtors' principal obligation is a monetary obligation.

As noted, the credit card processors have a monetary obligation and owe money to the Debtors arising out of their processing of credit cards used by customers of the Debtors.

It's clear to me that they owe this money based on my review of the processing agreements themselves which base their right to hold the money on the mutual obligation that the Debtor owes them for chargebacks and future other amounts that would be owed either by nature of setoff or recoupment under the processing agreements, i.e., these reserves are being held on account of amounts owed mutually by both parties to the transaction even though neither party has an immediate payment obligation, hence the use of the term "reserve."

Transform Holdco contends that those obligations, and more specifically the mutual obligation owed by the respective processors to the Debtors, is neither one in connection with the sale -- I'm sorry, is not -- is neither resulting from charges by a customer of a seller on credit

card processed by such processor or in the ordinary course of the -- of business. On the latter point, it appears that one of the processors, First Data, exercised its right to a reserve based upon a specific triggering fact under Section 4.7 of its agreement pertaining to the availability of revolving credit facility in the specified amount.

Transform Holdco also argues that the obligation owed by the credit card processor to the Debtor is different from the definition of account that I previously read and does not result from charges by a customer of the Debtors for the use of the credit cards processed by the processor. As to that latter point, I disagree. I believe that the language is more than broad enough in the definition of Section 1.1(a) both in its incorporation of the term "account" and in its use of the phrase "resulting from" to encompass the obligation, albeit not yet -- not necessarily realized on the -- closing it as a due obligation that is due in the sense of immediately due to make payment to the Debtor, but nevertheless, it’s a fairly owed obligation to give rise to a right of setoff.

And it would ultimately be owed once the customer chargeback and related grounds for setoff were determined, resulting from language obviously on its face is quite broad as is the definition of account in the Delaware UCC that I have previously quoted, namely a right to payment whether or

not earned by performance which can rise among other things out of the use of the credit or charged card. That's the entire basis for the relationship between the processors and the Debtor and I believe what was contemplated by this provision.

That leaves the issue of the meaning of the phrase at the end of the definition "in each case in the ordinary course of its business." It appears clear to me and as is consistent with the last antecedent rule of interpretation that this phrase refers to the ordinary course of incurrence of the credit card charges in the first place and not any unusual relationship separate and apart from that between the processor and Sears.

That leaves the remaining defense raised by Transform Holdco that notwithstanding the inclusion of the reserved security -- the reserved amounts by the credit card processors in the term "security deposit," such amounts are also included within the term "credit card accounts receivable." The operation of Section 10.9 restricts the particular credit cards receivable amounts that go to the $1.657 billion cap to amounts due to the seller as pertaining to amounts immediately due or actually and presently due and payable to be paid to the seller immediately. Of course, those extra words are not in the phrase. The phrase merely uses the word "due to seller."

The plain meaning of this term I believe is on all fours with the term "owed" as opposed to immediately due. And I believe that interpretation is consistent with the definition of credit card accounts receivable and the operation of this provision which I believe requires the parties to look at the credit card accounts receivable with a snapshot which however takes into account information they learn post-closing as to whether they are in fact owed as of the closing date. You would not know that calculus until after the closing date, and I believe that requires one to take into account that they need not be immediately payable but rather simply owing to the seller as of the closing date. I say that in part based on the nature of the adjustment that's laid out in Section 10.9.

So in light of that conclusion, I will grant the Debtors' motion insofar as it seeks to implement Section 10.9 by including within it all amounts in the respective reserve accounts to the extent that they are not actually applied by the credit card processors appropriately to amounts that Sears owes the processors, again, as of the closing date.

So the Debtors can email an order to that effect to chambers. You don't need to formally settle the order on counsel for Transform Holdco, but you should run it by them before you email it to chambers so that they can make sure

it's consistent with my ruling.

There is a separate aspect of the relief sought by the Debtors for a declaration that Transform Holdco had violated the automatic stay by not causing such funds to be paid over. It appears to me that this issue was complex enough and that the funds in fact were being held by a third party that to the extent there was any violation of the automatic stay, given the prompt resolution of the matter, there should be no damages flowing from it. So I will deny that aspect of the motion on that basis that to the extent there's any violation of the stay, it would not give rise to any independent or separate obligation by Transform Holdco to the Debtors.

MR. SCHROCK: Your Honor, Ray Schrock for the Debtors. Just to clarify, there were two other issues raised in the motion to enforce the February rent proration and the cash in transit.

THE COURT: Right. But as I understand, the parties are still leaving those open at least for a few days.

MR. SCHROCK: Exactly, Your Honor.

THE COURT: Okay.

MR. SCHROCK: And my --

THE COURT: So this is just a partial resolution of the motion, this ruling.

MR. SCHROCK: Understood. Just as a matter of procedure to make sure that, you know, we keep these issues open, there were some other issues that were raised by Transform Holdco related to amounts that the Debtors believe are due to them and they believe their ongoing disputes were working through them.

And just so that we can be efficient, Your Honor, and make sure that these issues remain in front of the Court, you know, we can always file I know a declaratory judgment action to bring it in front of the Court, but we've got a current motion, you know, to enforce. If the parties can't work these other open issues out that were raised by Transform Holdco and the Debtors, you know, we'd like to have an efficient vehicle to frankly put them up for a hearing under the current motion.

THE COURT: I mean you would have to give me papers on them one way or the other because --

MR. SCHROCK: Exactly.

THE COURT: -- they're new issues. So I leave it up to the parties whether -- I mean you probably ought to just file something new on it --

MR. SCHROCK: Okay. Fair enough, Judge. That's what --

THE COURT: -- unless it's really an outgrowth of the issues that are covered by this current motion.

MR. SCHROCK: No, that's fine, Your Honor. We'll just file something new. And I do want to raise them just because they're -- you know, some of them like for instance, you know, the payment of the $166 million other payables, they're relevant to -- you know, there's a number of parties that are requesting administrative payments. And so they're fresh so we're going to have to move on them, you know, relatively quickly.

THE COURT: Right. Okay.

MR. SCHROCK: Thanks very much, Your Honor. I believe the next item on the agenda is Wilmington Trust's motion for related to cash collateral.

THE COURT: Okay. Now I've been going for a while now. I'm fine to keep going, but if anyone wants to take a break, they can do it. No? Okay, let's go ahead with that motion then.

MR. FOX: Good afternoon, Your Honor. Edward Fox with Seyfarth Shaw on behalf of Wilmington Trust, National Association as Indenture Trustee and Collateral Agent. Your Honor, this is a motion by Wilmington Trust to prohibit or condition the Debtors' continued use of cash collateral.

At the outset, I just want to clear up one issue the Debtors have raised in their objection a question about Wilmington Trust's standing. Mr. Schrock contacted me last evening to advise that they were not going to pursue that

objection and that they recognize that we are the collateral agent and have standing to make the motion.

THE COURT: Okay.

MR. SCHROCK: That's correct, Your Honor.

THE COURT: But you're not waiving your rights that they may be unsecured or under secured?

MR. SCHROCK: That's correct, Your Honor. But I believe that given that they're collateral agent for the entire cap stack over there, we weren't going to frankly waste a lot of time arguing about standing.

THE COURT: Okay. That's fine.

MR. FOX: Your Honor, the Court entered an order in November of 2018. It's a final order authorizing the Debtors to obtain and get financing in the roll-up DIP of the first lien and also to use cash collateral. And that cash collateral is cash collateral in which the holders of the pre-petition second lien obligations have an interest as it secures their outstanding obligations as well.

Under the terms of the order, the Debtors were authorized to use cash collateral subject to and consistent with the terms of the approved budget which was a defined term. And the approved budget was annexed as Exhibit C to the order that was entered. And we included a copy at the end of my declaration as well. That budget, that approved budget carried the Debtors through February 16, 2019 which

as it turned out was five days after the closing of the sale substantially but not all of the Debtors' assets.

There as far as we know and have been advised there was no extension of that budget, although I'll get to the Debtors have a view about that. But to the extent there was any extension by the DIP ABL lenders, the Debtors would concede that that did not take them beyond March 16th of 2019.

THE COURT: Well, what the DIP ABL lenders paid out?

MR. FOX: Yes, they were.

THE COURT: So why would they agree to -- why would they bother to deal with an extension?

MR. FOX: Well, we don't believe they ever did. In fact, they told us to the contrary.

THE COURT: So why -- because they're paid.

MR. FOX: Yes.

THE COURT: They shouldn't be spending any more time on the file.

MR. FOX: I agree, Your Honor.

THE COURT: So why is that extension even relevant?

MR. FOX: Well, it's only relevant because the Debtors have raised that as a defense.

THE COURT: No. But what I'm saying is you're

relying on their not consenting to an extension of the budget, but there's a pretty good reason why they're not consenting, which is they're not paid. That doesn't mean that you somehow have a right to consent.

MR. FOX: And we're not suggesting that we do, Your Honor.

THE COURT: So but the whole right is theirs. And it's a pretty good reason why they haven't consented.

MR. FOX: I understand that, Your Honor, but the order is conditioned -- it limits the Debtors to making expenditures in accordance with that budget. If there's no budget anymore, then there's no right under the order for the Debtors to continue to use cash collateral going forward.

THE COURT: So --

MR. FOX: Otherwise what we end up with is an order that as the Debtors read it would allow them to do whatever they wish with respect to cash collateral with no limitations whatsoever. And according to them, the second lien which is now the only remaining lien has no ability to have anything to say about what they can or cannot do with that cash collateral. And according to them, it even seemingly prevents us from coming back to the Court to ask the Court to address that issue either by enforcing the order or alternatively under 363(e).

So we're in a situation now where as I said, we believe --

THE COURT: So I'm sorry. So you're saying that the authority to use cash collateral ended on the payout of the DIP lenders and ABL lenders?

MR. FOX: Well, that's effectively what happened because the Debtors' ability to comply with the terms of the order that was entered no longer exists.

THE COURT: Is there any disagreement about the use of the cash collateral?

MR. FOX: You mean going forward between us?

THE COURT: Yes.

MR. FOX: We've not had that discussion. The Debtors -- I mean we're open to having that.

THE COURT: Well, don't you think you should do that before precipitating a totally unnecessary crisis of this case where the Debtors can't use any cash?

MR. FOX: Your Honor, we wrote to the Debtors and asked before filing the motion and asked them to explain the basis on which they continue to believe that they're entitled to spend cash collateral. They responded and said they were entitled to. I spoke with Mr. Schrock before we filed the motion, and we've had conversations since then and there's --

THE COURT: All right. Well, maybe the question's

addressed to the both of you.

MR. FOX: I'm happy to have that --

THE COURT: Well, I think you should.

MR. FOX: Okay.

THE COURT: I could go through this and I will if you want, and I think pretty much come up with the argument that as drafted, neither your argument nor the Debtors' argument makes a whole lot of sense. Normally there's a provision in these that says that, you know, under materially changed circumstances, lenders can come back and dispute the use of cash collateral. Well, that's not in here as far as I can see.

On the other hand, to argue that you gave your cash collateral rights up to the DIP and ABL lenders but somehow got them back when they were paid in full, it's a bit of a stretch to just throw the bomb into the case. So I think you all should meet, work through a process, and if you can't do it, I'll decide it because that's really what we're talking about here.

MR. FOX: We're happy to do that.

THE COURT: Okay.

MR. FOX: It takes two to tango.

THE COURT: Well, that's true. So you all should start tangoing. Actually, it's three because the Committee would be involved, too. So that'll be an interesting dance,

but that's how it works.

MR. SCHROCK: Judge, I --

THE COURT: And by the way, there's no limitations under 506(c) and 105 either or 552 as far as the -- 506(c), excuse me, on I think on certain parties here. So, you know, we should just get to what's real here which is if you really believe the Debtors are wasting your cash collateral, I understand. If they aren't, then we should just move on to get the case over with.

MR. FOX: Our concern is, Your Honor, that there's a limited amount of cash available and but for the previous motion, there's nothing else coming into the estate. So what we're left with is seeing the cash continue to be spent with nothing to replace it but for --

THE COURT: Well -- but honestly, what's the alternative? I mean if they can't spend the cash at all, then you're going to be dealing with the Trustee who you're going to be paying. And I guess I could understand why targets of litigation might somehow think that's right, although I imagine the Trustee would hire the same people that analyzed those causes of action over the last few months so that they can file a, you know, 110-page complaint.

So I just think the parties should get real here and see where they are as far as a timeline to get out of

the case. And I'm not suggesting you're not being real. I understand your point. You see this glitch in the agreement. It's the type of glitch that would drive an indenture trustee crazy. I understand that. Let's just be realistic about it.

MR. SCHROCK: And, Your Honor, we're happy to sit down with them. I think the fundamental issue just that is going to before the parties. So we have been using cash collateral because we believe we're authorized to do so. I think they've raised this issue. We looked at the order as we did, you know, with the closing and we said, listen, we're going to have to sit down obviously at some point to deal with this. I think they want us, some of the second lien parties who don't have rights against the winddown account are looking at the Debtor saying, hey, why don't you use the winddown account proceeds at this point and start to get --

THE COURT: Well, I don't know. I mean that --

MR. SCHROCK: And so we have to work that out.

THE COURT: That comes through very remotely in the papers, but --

MR. SCHROCK: Yes.

THE COURT: -- those rights are defined.

MR. SCHROCK: Yes.

THE COURT: And the carveout is defined.

MR. SCHROCK: Right.

THE COURT: And frankly, the APA which lays out the mechanism for what I think isn't covered by the carveout and the winddown is something that clearly the movant and the parties joining in this motion and the DIP lenders and the ABL lenders were all perfectly fine with. So, you know, I don't know what we're talking about here except maybe trying to get some leverage in the plan negotiation process which isn't going to work.

MR. SCHROCK: And, Your Honor, if I could just make a suggestion then. We'll sit down. We'll try and work it out. If we can't we'll contact the Court and --

THE COURT: Okay.

MR. SCHROCK: -- just have a quick status conference to discuss how to proceed --

THE COURT: That's fine.

MR. SCHROCK: -- if that’s acceptable.

MR. FOX: Sure.

THE COURT: Okay.

MR. FOX: Thank you, Your Honor.

THE COURT: Okay.

MR. O'NEAL: Sean O'Neal with Cleary Gottlieb on behalf of the ESL. I only stand up just to confirm that we'll be part of those discussions as second lienholders.

THE COURT: Well, I don't know. I mean there are

specific provisions of the DIP order that deal with ESL. And your colleague behind you for --

MR. KRELLER: Cyrus.

MR. O'NEAL: Yes.

THE COURT: So --

MR. O'NEAL: Understood, Your Honor. Though --

THE COURT: I mean the indenture trustee is the one with the lien.

MR. O'NEAL: Well, also, let's be clear we're talking about the collateral agent which is Bloomington Trust. He's also the indenture trustee for one of the tranches.

THE COURT: Look, if they try to --

MR. O'NEAL: But ESL does --

THE COURT: If they're trying to take something away from your clients, you and Cyrus, yes, absolutely.

MR. O'NEAL: Yes.

THE COURT: If you want to be involved.

MR. O'NEAL: Just to be clear that ESL as a second lienholder does have adequate protection liens and claims. We do have those.

THE COURT: Well, there are lots of reserved right.

MR. O'NEAL: Yes.

THE COURT: That's all I can say.

MR. O'NEAL: But we actually have those liens.

THE COURT: Right.

MR. O'NEAL: And they're in the order and actually discussed in the settlement.

THE COURT: You do. And it's to protect for diminution of collateral in the process where ESL became the buyer of the company. So --

MR. O'NEAL: Correct, Your Honor.

THE COURT: -- you know, let's --

MR. O'NEAL: Okay. And I just wanted to --

THE COURT: I think that also had -- let's get real here.

MR. O'NEAL: Thank you, Your Honor.

THE COURT: Okay. I.e, it goes what it wanted. So it's hard to argue with diminished.

MR. KRELLER: Your Honor, Thomas Kreller with Milbank, LLP, on behalf of Cyrus Capital. I'll be brief, Your Honor. Just to be clear and for the record, the notion was not that the consent to the use of cash collateral was being withdrawn, thereby leaving the Debtors with no ability to use cash.

THE COURT: Right.

MR. KRELLER: We're exactly in the scenario, and this is the adequate protection was negotiated this way. We negotiated for adequate protection. We gave consent to cash

collateral. The Debtors negotiated for a winddown reserve. If you were to shut off the use of cash collateral, they would turn to their winddown reserve which is if the winddown reserve is not to cover the cost of the case post-closing to plan confirmation, I don't know what else it is for.

And if you look at the budget that the Debtors --

THE COURT: Well, there's a carveout.

MR. KRELLER: There's a --

THE COURT: And there are certain -- let me just see.

MR. KRELLER: Your Honor, there's actually --

THE COURT: There's a -- the waiver of 506(c) I don't think covers your clients. So, again --

MR. KRELLER: Your Honor?

THE COURT: -- it's not that simple.

MR. KRELLER: Your Honor, I'm trying to make a different point. The Debtors attached a budget to their reply where they show a winddown account with $93 million in it. So I don't think that it's a fair characterization to say the lenders are stepping up, the second lien creditors are stepping up trying to shut the Debtors off of the use of cash collateral. The Debtors have a $90 million --

THE COURT: I'm not --

MR. KRELLER: -- winddown budget.

THE COURT: I mean I said to Mr. Fox I understand why the collateral agent and indenture trustee brought this motion. But I think that who should be funding this case is not nearly as simple as you posit. The winddown account among other things was meant to take into account and protect against the risk of administrative insolvency, to protect administrative expense creditors, to protect 503(b)(9) creditors who have administrative expense claims. It wasn't just to wind down from now going forward. That's a nice name for it, but I believe it was meant to cover more than that. And instead, it wasn't -- we have the 506(c) issues.

MR. KRELLER: Understood, Your Honor. I think there's a burden on the 506(c), particularly with respect to my client Cyrus who is not the buyer. But that'll be for another day.

THE COURT: Well, it will because I think they're fairly close to each other.

MR. KRELLER: Your Honor, we'll make the record clear on that.

THE COURT: Okay.

MR. KRELLER: We're not an insider. We are not the buyer.

THE COURT: Okay.

MR. KRELLER: The point is this, Your Honor. The

winddown budget, you're right, is there to protect administrative creditors. It's not at the moment protecting super priority administrative creditors. The debtors are marshaling their cash and using cash collateral without consent in a manner designed to allow them to pay administrative expenses, regular way administrative expenses during the case in a case where there may not be cash as when we stand at the confirmation to pay the 507(b) claims.

THE COURT: To the extent there are any, but again, you have to look at -- again, that's where 506(c) comes into place. You know, I don't know what the snapshot on the start of the case and the snapshot at the end of the case will look like and whether as was argued to me the sale which the ongoing administrative expenses clearly contributed to the value of actually enhanced the value of your client's collateral. So those are all open issues.

MR. KRELLER: Your Honor --

THE COURT: It's not that easy to decide in advance and it's probably something that the parties should try to resolve not in terms of doing a budget that specifies exactly where the money is going to come from, or at least leaves open -- let's put it that way. It should leave open reallocation of it. It's fungible in other words.

MR. KRELLER: It is fungible, Your Honor, and that's actually a good point. Number one, we've begun that

dialogue. In fact, we made a proposal to the Debtors in the beginning of March. We are still awaiting a counterproposal.

THE COURT: Okay.

MR. KRELLER: And just so to size this for you a bit, we believe Cyrus' position is that our 507(b) claim is in the neighborhood of $60 million to the point of closing plus then whatever collateral of ours has been dissipated since then in our position without our consent.

And, Your Honor, to the extent it's fungible, the other problem that I want to alert you to because I think what you would hear from Mr. Schrock is the DIP order says we don't have a lien on the winddown budget and we can't access that, what that means -- what that doesn't mean is that doesn't override the requirement under 1129(a)(9) that if we have an allowed 507(b) claim, it has to be paid in full.

THE COURT: That's true.

MR. KRELLER: And so --

THE COURT: But the key word there is "if."

MR. KRELLER: Absolutely, Your Honor.

THE COURT: Okay.

MR. KRELLER: But my point is this. What -- the risk that we have is that come plan time, Mr. Schrock stands up and says you don't have any rights to that winddown

reserve and there's no other cash to pay our 507(b) claim. I don't think they can override 1129(a)(9) in that fashion, and I expect that's probably something we'll confront if we're unable to resolve this consensually.

THE COURT: Well, clearly, I can't confirm a plan unless parties consent. But that's not today's issue, which is why I suggest that when you work out a budget, you leave the issue of allocation to another day which is not that far off. It's like 30 days from now --

MR. KRELLER: Your Honor --

THE COURT: -- or 60 days from now.

MR. KRELLER: -- we'll be happy to do that, to work out a budget. We would have to see a budget and this is the first we've --

THE COURT: Sure.

MR. KRELLER: And our concern, Your Honor, is Mr. Schrock stands here and says it's a simple waterfall plan. The problem with that is you need water. And it's not clear there's a whole lot of water here.

THE COURT: Well, okay.

MR. KRELLER: So, Your Honor, we'll work -- and the super priority claims to the extent they exist and are ultimately allowed, are being made to bear that risk.

THE COURT: Okay.

MR. KRELLER: Thank you, Your Honor.

MR. SCHROCK: We'll be happy to sit down, Judge.

THE COURT: Okay.

MR. SCHROCK: They took all the water, but we're trying to deal with that. Thank you, and we'll be back in touch with the Court if we can't work that out.

MR. FRIEDMAN: Your Honor, Jared Friedman, Weil Gotshal, on behalf of the Debtors. The next two agenda items, Number 3 is supposed to be the motion of Debtors to compel turnover of estate property.

THE COURT: Yes.

MR. FRIEDMAN: And Number 4 is dealing with related issues. It's the motion of the Community Unit School District 300 for relief from the automatic stay or in the alternative for abstention. I spoke to the school district's counsel prior to the hearing today. They requested if it's amenable, the Court is amenable to it to flip the order of those because the motion for stay also includes a request for an abstention, they asked to have that heard first because in the event that they're successful on that, that might moot our motion for turnover.

We have no objection if they want to proceed in that order, but we'd leave it to Your Honor to make that determination.

THE COURT: Okay. That's fine.

MR. FRIEDMAN: It's their motion. I'll turn it

over to them.

THE COURT: Okay.

MR. GENSBURG: Good afternoon, Your Honor. Matt Gensburg on behalf of Community Unit School District 300. Your Honor, I have a number of colleagues. We sort of split the tasks here, so I'd like to introduce a couple of folks to you if I may. I have Alan (indiscernible) is my co-counsel in bankruptcy. I got Ken Florey is municipal law and tax counsel. And Cory Atkinson who's also a municipal law tax counsel.

Your Honor, there's really four matters in front of you that all revolve around the same thing or related to the same thing. There's our motion to modify the stay, and in that motion, we also included a request for abstention under 1334(c)(2) and 1334(c)(1). There's a motion of the Debtor to compel turnover under 542. And then there's a related motion to strike the declaration of Mr. Meghji.

When you think about the flow of the analysis, Your Honor, we thought it made sense for the Court to consider the 1334(c)(2) matter first, mandatory abstention, because we believe that all those elements are met and if the Court agrees with us, that none of the other issues need to be dealt with today. And so with the Court's indulgence, I'd like to go through our analysis of 1334(c)(2), answer any questions Your Honor may have with respect to that.

THE COURT: Okay. Before we start on that, what would the school district get back under the EDA Act if the funds are not distributed to the Debtor?

MR. GENSBURG: So the school district, Your Honor, is the largest taxing district involved. We would get 60 percent of that.

THE COURT: Okay. All right.

MR. GENSBURG: So, Your Honor, I'm going to start with 1334(c)(2) which states basically that the Court must abstain from the proceeding if six prerequisites are satisfied. Those prerequisites are timely motion has been made, the proceeding is based on state law claim or state law cause of action, the proceeding is related to a case under Title 11, the proceeding does not arise under or arise in a case under Title 11. But absent jurisdiction under 1334, there would be no federal jurisdiction here at all over this matter entitling adjudication of the Court original jurisdiction.

Every one of those elements are met. So let's take each one. First, timely motion. We filed our motion to modify the stay and our request for abstention on November 12th of 2018. You might recall, Your Honor, I'm sure you read all the pleadings --

THE COURT: No, I don't have an issue on your client's timeliness.

MR. GENSBURG: I'm sorry, sir.

THE COURT: I don't have an issue on that point.

MR. GENSBURG: Okay. We'll go on. State law, I don't think anyone's disputing that the matters at issue right now between Sears and the school district involves exclusively issues of state law and state law claims causes of action. This involves the Illinois EDA Act. It's a unique Illinois legislation, also involves an economic development agreement entered into by Sears in 1990 which implemented the Illinois EDA Act.

When you look at the briefs, a large portion of the briefs are just voided to try and interpret this legislation. And, you know, we filed our action, the Illinois action pre-petition. If this case were to go away and were to be dismissed for some reason or had never been filed, this would still be out here as an issue. It would be resolved in the state court where the matter was originally filed. I don't think anyone's disputing the fact that this is a state law issue.

THE COURT: Well, the Debtors contend -- and if they're right on the facts, I think they're right on the law, that to get there, you have to make it -- I'll have to conclude that it is a real issue, a difficult issue of state law. There has to be a limit, in other words, to the argument that a non-debtor third party doesn't have to turn

over property, doesn't have to perform an agreement or otherwise exercise control over property of the estate and force a debtor to go pursue its rights in some other forum.

MR. GENSBURG: Actually, Your Honor, I think in the way you framed it, you jumped a couple of steps forward because that's not what it is. The question here is whether Sears complied with the terms of the Illinois EDA Act.

THE COURT: I know, but if the -- I'm not -- I don't have a view on this yet. But if the answer to that is yes, clearly, this is a no-brainer, then it really isn't an issue guided by state law because it's not an issue.

MR. GENSBURG: Well, right. And it's sort of -- it gets a little circular here.

THE COURT: Well, it doesn't because Congress clearly did not mean that any party to which a debtor has some dispute with can force the debtor to pursue it notwithstanding the automatic stay, notwithstanding 542 in a state court where it's perfectly clear that there really isn't a dispute. There's no real dispute.

MR. GENSBURG: Your Honor, on that point, I guess you and I are not going to disagree.

THE COURT: Okay.

MR. GENSBURG: Because clearly what you're talking about is 542. And we all know the case law under 542. 542 is meant to bring into property that's already undisputed

property of the estate.

THE COURT: Well, you can't just raise your hand and say I dispute. It has to be a real dispute.

MR. GENSBURG: Oh, absolutely.

THE COURT: Okay.

MR. GENSBURG: Absolutely. And that's what the cases say. You know, they use -- you know, and you look at the verbiage in the cases and you see some cases say frivolous. It refers to frivolous dispute and not legitimate dispute, not bona fide, not substantial. And I understand that. And what the Debtors can convince Your Honor is that this matter is not a bona fide dispute so that it is under 542, then I think it's correct and falls within the confines and it is in fact a core proceeding.

But, you know, the Supreme Court talked about this a long time ago in Northern Pipeline. In Northern Pipeline, you'll recall is a breach of contract action, and the contract would have augmented the estate. And what the Court did is it made a clear distinction between public rights which govern Article I courts and private rights. And what we have here, we have a contract and we have a question. You know, did Sears comply with the terms of the contract or did not comply with the terms of the contract?

And it gets a little more complicated because within that question, there's a question of, all right, what

year's relevant. Sears says 2017. We think it's 2018. And then it gets even more complicated by saying, well, do you count tenants and contractor employees or do you limit it just to Sears employees. And then you add on top of that the third issue is even if they're right about 2017-2018 issue and even if you determine that they're entitled to count tenants and contractors, when you count those tenants and contractors, do they meet the limit. Well, those are all the issues --

THE COURT: I'm sorry. When you say there's a factual issue, even if you count the tenants and the contractors?

MR. GENSBURG: There is.

THE COURT: Okay.

MR. GENSBURG: There is and which drove our motion to strike to a certain extent. And so I guess, Your Honor, I'm not debating the fact that if you -- and that's why I have Mr. Florey here. If Your Honor's going to tell me that, counsel, this is as clear as day. This legislation that's not the epitome of clarity is clear as day. You're a loser. I can see it. That's sort of a 12(b)(6) argument.

In CIL, that's exactly how the court dealt with it. The court dealt with this turnover issue by treating it almost like a 12(b)(6) issue had they stated a plausible claim.

THE COURT: Right.

MR. GENSBURG: I tried to figure out because when you look at the decisions, the courts really don't explain, well, how do you know --

THE COURT: That's a fair analogy.

MR. GENSBURG: And but there's other analogies that even may be closer. You know, under 303 of the Bankruptcy Code involuntary, if you're a petitioning creditor, you have to have a (indiscernible) subject to bona fide dispute. And so when Your Honor is dealing with are there appropriate creditors here and one of the questions you're asking I assume depending on the facts that arise, is this a bona fide dispute. This is the same issue to a certain extent.

THE COURT: No, that case law is very different because of the policy against involuntaries. But go ahead.

MR. GENSBURG: Okay.

THE COURT: It's okay.

MR. GENSBURG: But where it gets a little -- in my mind, a little unclear is -- and I get the impression Sears is suggesting that you should actually resolve the dispute to determine whether it's a bona fide dispute. And that I think would be inappropriate. I don't think that's -- that would just basically say, well, Northern Pipeline is irrelevant. You need to determine, look at the facts and

determine whether there's really a dispute here. And if there is really a dispute here and this is the only basis for them having jurisdiction, then the Court must abstain, assuming that we've --

THE COURT: Well --

MR. GENSBURG: -- convinced you with respect to the other elements of 1334(c)(2).

THE COURT: Right. Okay.

MR. GENSBURG: So if that's where we're going and whether there's a bona fide dispute and all the other elements of 1334(c)(2) have been conceded, then --

THE COURT: Well, I'm not sure they are. Will the pending Illinois action result in a timely adjudication?

MR. GENSBURG: I believe it will, Your Honor. And so let me address that. So first of all, there's a -- you know, AOG Entertainment from this district dealt with that issue. And basically what that court says is it stated that out of deference for -- to the paramount interest of another sovereign and out of respect for principles of comity and federalism, "Absent contrary evidence, a federal court must presume that the state court will operate efficiently and effectively in adjudicating the matters before it."

And then another case from this district, (indiscernible) Capital basically says that the burden

should be on the Debtor to prove that the state cannot adjudicate claims in a timely manner. And, Your Honor, they simply have not met their burden. What the Debtors say in their briefs is they say, well, Your Honor, can do it faster. Well, when I go on, I'll explain why --

THE COURT: Just tell me what your projected timeline is on this.

MR. GENSBURG: Right now, Your Honor -- well, I guess this should be if it's a straightforward as their counsel suggests and it can be cited as a matter of law and not as a -- I think this could be resolved in 30 to 60 days. It's already pending before the Court. They got stayed and motion for injunctive relief.

THE COURT: By?

MR. GENSBURG: I'm sorry, Your Honor.

THE COURT: That motion by whom for injunctive relief?

MR. GENSBURG: By the school district. And it was going to be -- it was set for argument and the bankruptcy got filed and they stopped it. If in fact this issue --

THE COURT: And I'm sorry, that's to enjoin the town from paying the money over?

MR. GENSBURG: Yes, sir.

THE COURT: Okay.

MR. GENSBURG: And issues -- and that's basically

the issue, right. The issue is don't pay it if they don't meet the prerequisites. The Debtors stated that this is a straightforward issue. I get the impression they believe that this Court can decide or any court can decide as a matter of law. There's no reason to believe if that's true that that's can't be decided in 30 to 60 days in Illinois. They certainly know how to do it.

And the statistics that I attached to our response say, you know, 81 percent of the cases, civil motions filed in Cook County now are resolved in 30 days. So --

THE COURT: Well, I would really like something more specific on this case. You know, a lot of the motions filed in Cook Count involve cars. So can you or one of your colleagues tell me their projection of the timeline of this case? I mean obviously an injunction would not -- it would give the parties a good idea what the Court believes the merits -- where the merits go, but it wouldn't decide the issues.

So I'm trying to -- I'm really trying to -- look, the reason I'm saying this is this is not a two- or three-year case. This is a case where the Debtors have reduced their hard assets to cash. Their obligations and that cash -- I'm sorry, their administrative expense obligations and that cash are very close to each other, so time is really important. And any extra cash is really important.

Now they may have all sorts of litigations claims, but those won't be realized for a long time and you can't use those to fund the payment of administrative expenses under a plan unless the administrative expense creditors consent. So resolving this case promptly is really important. And I think what Congress drafted or -- yes, when Congress or the Supreme Court drafted these provisions, when they used the word "timely," they wanted to take -- they wanted the bankruptcy court to take into account the effect of the state court litigation on the bankruptcy case.

So what is your best --

MR. GENSBURG: And what I'll do, Your Honor --

THE COURT: Just what is your best estimate and why of the likely -- I understand if there's going to be a trial, that's a different issue. You know, if there's going to be a trial on whether even counting the third parties who work at the site or worked at the site, that will take months longer. But just on a motion to dismiss type of standard on either the 2017 versus 2018 and/or it has to be Sears as opposed to Sears past people who worked there, what's your best estimate of --

MR. GENSBURG: Let me allow Mr. Florey --

THE COURT: Okay.

MR. FLOREY: Good morning, Judge. Ken Florey from Robin Schwartz on behalf of the School District 300. Judge,

the state court case is still active pending the ruling from this Court on the automatic stay. And Cook County is used to dealing with expedited cases. There are election cases that when there's a need for a quicker briefing schedule for rulings and issues of the law, the courts are cooperative in doing that. That's exactly what we would be doing.

If you give us the relief, if you abstain and we're back in the state court, we'll be filing motions next week. We'll get a hearing on the temporary restraining order to be followed by a motion for summary judgment on the issues of law. And if counsel's right, there are not many disputed fact issues, we could get a ruling very quickly. We would be going under expedited briefing schedule. We would have it briefed. You can expect the ruling within 30 to 60 days.

THE COURT: Of the abstention or of the filing the motion?

MR. FLOREY: From tomorrow.

THE COURT: Okay. And it would seem to me that your client would really want the money, right? You wouldn't be delaying the process knowing that there would be some leverage on the Debtor if you did that?

MR. FLOREY: Judge, this money will be going towards -- first of all, the school district is 21 buildings. There's --

THE COURT: No, I'm sorry. I didn't -- it wasn't clear. Would you undertake not to delay the process?

MR. FLOREY: We want the money tomorrow. We need the money for --

THE COURT: All right.

MR. FLOREY: -- security measures to secure our schools.

THE COURT: So the answer to my question is yes, you won't delay the process?

MR. FLOREY: Yes, absolutely.

THE COURT: Okay.

MR. FLOREY: The money is -- the time of this money is critical.

THE COURT: Okay. So why don't I hear from your colleague then.

MR. GENSBURG: On that point, Your Honor, I just want to make one other point with respect to this Court. If I'm right, I think I am, that this matter is related to -- it's clearly related to -- but it's not core, then what we ought to keep in mind is what's going to have to happen. Your Honor's going to make findings of fact and conclusions of law and that's got to be sent up to the district court to consider.

The only way we avoid that is if Your Honor determines that this is in fact court and I don't know how

--

THE COURT: Well, we're back to the 12(b)(6) type of point.

MR. GENSBURG: Yes, we are.

THE COURT: Okay.

MR. GENSBURG: And so I think in summary, Your Honor, with respect to 1334(c)(2), it sounds like those are the only two issues. You got us into the time frame. The school district, we filed this motion in November because we needed the money. We still need the money even more. So we have every incentive to get this done promptly.

And then the real question, Your Honor, is whether this is -- the dispute is functionally frivolous or not bona fide or -- and I wish I could find a case that actually defined what does it mean not to be bona fide. And that's why I went to 303 because 303 actually uses the word "bona fide." And I was trying to find something similar to that and you just don't find in the case law. What you find is cases that say, you know, for example, one decision in which they argue that they didn't owe the money and there was a dispute but the Court looked at the defense, I forget what it was, and it said there's no possibility under this agreement that that defense has any validity at all. And that's I think the Court that said it was frivolous. That's not where we are.

And so, I guess in trying to figure out what the appropriate step is at this point, if Your Honor wants, I can give it back to Mr. Florey. Mr. Florey can explain to you his analysis with respect to the statute, both the years, you know, which year's applicable. He could explain to Your Honor the school district's analysis with respect to can you count tenants and contractors or not because the statute's not really clear on this point. And then we can deal with the issue of even if you can do all of that, whether Sears up to this point has actually proven the elements of the number of tenants that worked, full-time equivalent tenants and number of contractors that were full-time equivalent contractors because we have problems with that. And that's the motion to strike.

So, Your Honor, you know, I guess I ask the Court to suggest how you'd like us to proceed.

THE COURT: What is your proof on the latter point? What is your evidence on the -- that the third parties don't add up to the number of -- the number in the EDA along with Sears?

MR. GENSBURG: Well, so our problem with that point which led to our motion to strike is that we don't know how and Mr. Meghji doesn't know how it was calculated. So --

THE COURT: Okay. So let's say you don't need to

present evidence on that because you just would cross-examine him.

MR. GENSBURG: Well --

THE COURT: And depose him, of course. We take discovery on that.

MR. GENSBURG: We sent him a notice of deposition and we sent Sears a 30(b)(6) notice.

THE COURT: Right.

MR. GENSBURG: And he came and we asked that question and he refers to a methodology, but he didn't what it was. And think about this.

THE COURT: So, no, I'm sorry. I understand your point which is this isn't an evidentiary hearing and you want to develop the record on that point.

MR. GENSBURG: And some of the tenants, Your Honor, (indiscernible) Sbarro.

THE COURT: I'm sorry.

MR. GENSBURG: Sbarro, you know, the authentic Italian --

THE COURT: Pizza?

MR. GENSBURG: Yeah.

THE COURT: Right.

MR. GENSBURG: And I would suggest it would be like, you know, Walmart that very few of their employees are full-time equivalent employees in that everyone's part-time

so you don't have to give them benefits. But I don't -- I have no idea how they calculated their numbers. And I don't think Mr. Meghji knows. I can guarantee you he doesn't know because he didn't tell us. We asked him the question. And that's an important fact assuming we even get to that point.

THE COURT: Right. Okay.

MR. GANSBURG: So, Your Honor, I guess -- would you like Mr. Florey to walk you through --

THE COURT: Yes.

MR. GANSBURG: Yes.

MR. FLOREY: Judge, a little background on Civil District 300. The school district has 21,000 students with 27,000 school buildings, and it is heavily reliant on commercial property taxes.

THE COURT: But can I just interrupt you for a second?

MR. FLOREY: Sure, Judge.

THE COURT: This subsidy has been going on for a while, right? I mean, they had to have budgeted, I would think, on the assumption that it would be paid again, right?

MR. FLOREY: Every year this subsidy exists, the costs grow. With Illinois, there's a --

THE COURT: Well, of course, that's a given with schools. But what I'm saying is it's not as if they built into their budget getting this money. It's a windfall,

right?

MR. FLOREY: It is not a windfall, Judge.

THE COURT: Well, all right.

MR. FLOREY: It's not a windfall. They've been disputing this. They've been demanding proof of compliance since Sears realized it breached the agreement with the state. There are two subsidy agreements in place for the facility, state subsidy-based income taxes, and the local subsidy based on property taxes.

In Illinois, school districts are heavily dependent for operations on commercial property taxes. The resident come in, they build houses, they create kids. Each kid is roughly $12,000. You have two kids, that's $24,000. You're going to get maybe four, five, six thousand dollars on that house. You're running a deficit for every single house that is built.

Well, since Sears came in and built their facility and homes grew, our burden just kept building and building for funding the education of these students. We're below the state average. We're at over 40 percent property --

THE COURT: All right. My only point is that's arguing that the statute was a mistake in the first place. I don't think... It doesn't do any good with me to argue that it would be nice for the school district to have the money because it's a tautology. I don't think there's

anything as far as beyond that.

MR. FLOREY: But the statute does have recapture provisions.

THE COURT: Right.

MR. FLOREY: And it was amended in --

THE COURT: That's fair. I understand that.

MR. FLOREY: -- in 2012.

THE COURT: I understand that.

MR. FLOREY: Remanded in 2012. There was a question and a doubt about whether Sears would comply with the 4,250-employee requirement.

THE COURT: Right.

MR. FLOREY: So, the recapture provision was specifically -- went into both statutes, the state statute and the local statute, to recover the funds. And we're at that point. We're at the point that the school district has been carefully monitoring since 2016. They were dropping employees like flies and were at that point where they dropped below the 4,250 for the state statute, and similarly they dropped below the 4,250 in the local statute.

Now the recapture provision has kicked in. We're in the position to be able to assert the recovery of those dollars. It's been -- it's desperately needed in the school district. You're talking about employees. You've asked if we budgeted for it. They're running at a deficit as far as

education funding for their district. This is necessary money, Judge.

All right. If you look to the statute, you're talking about what we've talked about repeatedly. What are the relevant numbers, Judge? What are the relevant -- what do we look to for the account for the employees?

Clearly, when you only count Sears employees, there's -- it's undisputed, they fail on that regard. They dropped below the 4,250 at least in early 2017, if not earlier. So, then Sears came up with the novel argument that we're going to change the year of how we're accounting.

The Village, in 2017, asked for a certification from Sears. Are you in compliance with the jobs requirement for 2017 data? They provided that answer with 2017 data.

In 2018, the Village submitted a similar (indiscernible). Are you in compliance with the jobs count for 2018, using 2018 data? Sears response was, we're going to use 2017 data. We're going to count the data we want to use twice, even though in that year there were all indications that failed to comply with that, based on only counting their own employees.

THE COURT: So, the first issue is the year issue?

MR. FLOREY: The year. Which year's data are we using?

THE COURT: Okay.

MR. FLOREY: The statute talks about that. And Cook County taxation, I could put you to sleep with an explanation of how that works. But the critical terms are levy taxes, levy new taxes paid. The statute -- the EDA Act talks about using the -- to satisfy the subsidy requirement of 4,250 employees, you use the data from the year the taxes are paid. They didn't use the year the taxes are levied.

Sears' argument requires you to go back to a prior year for the levy. There's no term of levy in the EDA Act, only paid, and it's used multiple times, as recited in our brief. So, based on that, just --

THE COURT: Although they say that in practice that's what the parties did.

MR. FLOREY: No, just the opposite.

THE COURT: You disagree with that?

MR. FLOREY: Look at the documentation from the Village. The Village asks for 2017, provide us 2017. For 2018, provide us 2018 data. Sears did it in 2017, as requested. Sears started playing games and 2018 when they realized they can't hit numbers. Then they decided, we'll just change the year, despite the practice, despite the clear language in the statute.

And then when that didn't work, they said, we're going to change the count. We're going to now start -- we've never counted contractor employees; we've never

counted tenants. We'll even count employers that are miles away from the campus. But in theory, have some economic development of Sears.

It continues to be a stretch for Sears to try to demonstrate that they complied with the statute and then the recapture provisions do not kick in.

THE COURT: Okay.

MR. FLOREY: So, the 2018, in our view, the statute is clear, the past practice is clear; you need to be using the 2018 data, not the 2017 data. And then we get into the employee count.

The statute talks about the developer. And the developer is not tied into Sears, but it has characteristics that Sears is the only company that does comply. It does not talk about the developer and its contractors and its third-party employers, or any other employers. None of which these employers receive any tax subsidies.

So, to claim that you can -- the burden of them and those other entities employing people without any benefit of a subsidy is a ridiculous interpretation of the statute.

The statute talks about the development agreement. It's much more specific and talks specifically about Sears as the developer and having to create, retain and maintain 4,250 jobs.

Let's talk about the state statute, because it's important, and these words that are in both the EDA Act, the local statute and the state statute. They use create, retain and maintain. Maintain is a critical word, Judge.

Maintain is the word used in the recapture provision. If Sears doesn't maintain 4,250 jobs, it loses the subsidy. Under the state statute, that's the exact term that's used. And if you're going to go outside the statutory language, as Sears wants you to do, and look to other statutes, cardinal rule of statutory construction, you look to similar statutes with similar terms to get your answer. Maintain under the state statute, meant Sears maintained the employees.

THE COURT: And what is your authority for that?

MR. FLOREY: The authority for just counting the Sears employees?

THE COURT: Yeah, that maintain means employ.

MR. FLOREY: Because that's how Sears settled with the state, saying, we did not -- Sears, as an entity alone, did not maintain 4,250 employees. So, under the state statute, which is the same target of employee count, similar subject, the maintain is, was, and been interpreted by both parties to mean Sears employees. So, that same word is used --

THE COURT: In --

MR. FLOREY: -- in the recapture provision.

THE COURT: In what context, though?

MR. FLOREY: The same context.

THE COURT: No.

MR. FLOREY: The context of providing the employees for the economic development.

THE COURT: But -- I'm not being clear. It's not a judicial decision.

MR. FLOREY: It is not a judicial decision; correct.

THE COURT: It is reflected in what?

MR. FLOREY: It's reflected in the statute, how it's been interpreted by the agency that -- the Department of Economic Development is a state agency created to process that statute. That was the party that Sears (indiscernible) was saying we did not reply with the jobs requirement. The state agency's interpretation of the statute are given a high amount of deference in Illinois, as in most jurisdictions. The conduct of the parties using the Sears employees only for the two --

THE COURT: As part of the settlement, though.

MR. FLOREY: It was a point of --

THE COURT: As part of the settlement?

MR. FLOREY: Correct.

THE COURT: Okay.

MR. FLOREY: So, when you take the word maintain that's used in both statutes, clearly, you're talking about Sears employees only. If the General Assembly of the Illinois Legislature sought to expand Sears ability to count other employers, you would have had language, express language to do that. In Illinois, as within most municipal jurisdictions, you must have express statutory language to authorize any type of conduct you're going to engage in.

THE COURT: I'm sorry. The statute you're relying on was enacted before or after that settlement?

MR. FLOREY: Prior to the settlement. They were both amended in 2012 --

THE COURT: Okay.

MR. FLOREY: -- to extend Sears' state and local subsidies for another 15 years.

THE COURT: Okay.

MR. FLOREY: So, you get past the 2018, 2017 issue. If we're correct, Sears is -- they lose. They lose. They don't come in compliance. If you get to the employee count issue, based on the statutory language, based on the interpretation of how the state is interpreted, and most importantly based on the legislative history, which we have included in our documents.

Interesting, very critical debate of the sponsor of the bill, the legislative history for our statute, before

the EDA Act, the question was raised. What if Sears drops out its employees -- and they had the presence of mind to ask this question in 2012 -- what if Sears has rough times, drops out its employees, goes to a lower count, couple hundred employees below the 4,250 number, and they have a skeletal crew operating there? Do they still receive the subsidy?

The sponsor of the bill said the intention of this statute is no. If they drop to that level, they lose the subsidy. That's a clear indication of the legislative intent, do you count other employees? The sponsor could have said, well, representative, you can also -- Sears is going -- there's going to be other employers still. There's going to be -- because it's not just a Sears campus.

There could be another company that comes in here and starts to lease the space with thousands of employees. They didn't say because its Sears as original economic development, they were going to continue to proceed with the subsidy, even though they're still there, still in existence, still operating on the campus.

That's critical that the General Assembly did not intend Sears to count anyone but its own employees. You have the burden of the employees. That's the only way you can receive the benefit of the subsidy.

So, based on the clear language of the EDA Act,

the development agreement which talks about Sears maintaining the 4,250 jobs, the practice of the parties, the legislative history, it's clear that only Sears employees are counted, for the same reasons it's clear that the year taxes are paid is the applicable year.

And if you get through all those levels, if you still disagree with us, as counsel said, they have no idea whether the numbers that they've presented, the documents they've presented as contractor employees, tenant employees, are liable numbers. They haven't even provided a list of the names of the tenants, the names of the contractors. It's just a term on their spreadsheet. They didn't -- it'd be very simple to say these are our tenants, Sbarro, dry cleaners, Dunkin' Donuts --

THE COURT: Right. And --

MR. FLOREY: -- whoever they are.

THE COURT: And the argument being made is that Mr. Meghji wasn't fully informed so he couldn't be a 30 (b)6 witness on that issue.

MR. FLOREY: He didn't even need to -- they just need to produce documentation, give us a -- I'm assuming they have leases. Give us copies of the lease, give us a list of the leases and the parties. Who are your contractors? Who are you counting? Who are the businesses?

If you can't even provide the names of the

tenants, the names of the contractors, the names of these other entities, how can you count for employees?

If you can't explain why we've -- and the term, the second (indiscernible) Misty Redman, she said -- she testified that the document they were relying on, Exhibit 13, hasn't been scrubbed. She called it scrubbed. No one has gone through and removed part-time employees.

So, they're relying on an unscrubbed -- using their terminology -- document to attempt to demonstrate to this Court that you get through all others hoops about can we count these obscure employees that we have no identity -- we don't identify the employers, we don't identify the employees, where they're only verifying whether they're full-time or part-time or anytime.

Any way you look at this, Judge, there is no basis in fact or law to grant their motion to compel. To the contrary, the arguments that we raise in opposition to that, as well as the demonstration of the bona fide dispute, it's pretty clear that exists, as counsel has argued. And I'll leave the rest to the abstention argument.

THE COURT: Okay. Thanks.

MR. GANSBURG: Your Honor, at this stage, I think it's probably appropriate, unless you have more questions for me, to hand it over to Mr. Friedmann.

THE COURT: Okay. That's fine.

MR. FRIEDMANN: Your Honor, Jared Friedmann, Weil Gotscal & Manges, on behalf of the Debtors. All right. I'm not even sure where to start.

Okay. So, beginning with the fact that for a mandatory abstention, all of our requirements need to be addressed and they need to be met by the movant seeking abstention here.

The issues here are clearly fundamental core issues. We're talking about property of the estate. Now, there --

THE COURT: Well, no, it hasn't been decided yet --

MR. FRIEDMANN: Well --

THE COURT: -- that they can't be released.

MR. FRIEDMANN: -- the Illinois action that they want to pursue -- so this is a motion for -- it was a motion for stay and also a motion for abstention, so the issues are a little bit conflated.

But the -- when he's talking about the injunction that's been filed and the complaint that's been filed, it doesn't just involve the amounts in our motion for turnover, which are the 2017 funds. It also seeks to recoup funds that were paid in 2016 and 2015, and I don't know how many years back.

So, it's both the funds that have not yet been

paid by the EDA, because they're sitting there right now, and the EDA is waiting to pay them to us. It includes funds that we already were paid, which they'd really, even if they were successful, not have -- just an unsecured claim, I guess. And it also seeks to seek a declaration going forward for claims that aren't yet ripe in 2018, 2019 and so on.

THE COURT: Well, that --

MR. FRIEDMANN: It's a lot broader than --

THE COURT: You're not going to be covering 2019, are you?

MR. FRIEDMANN: Are we covering 2019 --

THE COURT: I mean --

MR. FRIEDMANN: Well, that's why we've moved on a very narrow issue, Your Honor.

THE COURT: Right.

MR. FRIEDMANN: Which is that right now, there are funds being held by the EDA for 2017, which we want to be turned over. That's the only thing we're moving on right now (indiscernible) has the right.

THE COURT: But the abstention is only as to the turnover motion, right? It's not -- the rest of it would be stayed, right?

MR. FRIEDMANN: I don't that's accurate. I think that the abstention motion was filed before we even moved

for turnover. The --

THE COURT: Well --

MR. FRIEDMANN: The first filing here was a --

THE COURT: Well, let's clarify that. I mean, I understand the point about the money that's sitting with the Town, but I mean, there's... What's the action requesting?

MR. GANSBURG: Well, Your Honor -- and you probably saw it in our brief. We offered a compromise on this point. All we need to know is determine whether Sears has complied with the terms of the EDA Act. Has it the 4,250 employees, which --

THE COURT: Well --

MR. GANSBURG: -- picks up the other two issues? And then, which would make sense, when did -- if it didn't comply or fell out of compliance, when did it fall out of compliance? That's it.

THE COURT: Well, that's a --

MR. GANSBURG: That --

THE COURT: That's not...

MR. GANSBURG: It seems... The only reason why I added that second part, Your Honor, because it seems efficient.

THE COURT: Well --

MR. GANSBURG: But if the Court --

THE COURT: That's not mandatory of the statute.

MR. GANSBURG: Right. Well, it would still fall under the mandatory of the statute, but not withstanding that --

THE COURT: It's not efficient because you've been litigating issues that might -- your client might get, you know, five cents on the dollar on -- six years from now. So, it's not efficient.

MR. GANSBURG: Well --

THE COURT: It would be efficient to decide the core legal issues, which would then be a matter of collateral estoppel on the claim. And of course, then you have the mandatory abstention issue for money that's being held.

MR. GANSBURG: And we'll go and look at that, Your Honor.

THE COURT: Okay.

MR. GANSBURG: And so, just have these matters resolved and then we'll come back to the Court and we can discuss through other pleadings what's the consequences of all that.

THE COURT: Okay.

MR. FRIEDMANN: All right. So, the second issue that we had discussed was timing, and you asked what, I guess, what they guess is how long it would take? I don't know if anybody knows the answer to that. I started hearing

about injunctions and summary judgment motions, and I'm sure that discovery would be taken in advance of all of that.

And based on the way in which it's been litigated in this court, I have absolutely no doubt that if we prevail in Illinois, there would then be appeals. So, the notion of 30 to 60 days --

THE COURT: Well, there'd be appeals --

MR. FRIEDMANN: There would be --

THE COURT: -- by me too.

MR. FRIEDMANN: -- appeals here as well. That's fine. But the notion that Illinois is a place for this can be timely adjudicated, I don't know that there's any basis for that at all, especially --

THE COURT: Well, is there a -- do you have anyone to represent to me how long you think it would take in Illinois, including the appellate process?

MR. FRIEDMANN: I don't. But the burden is on them to prove to you that in fact it would be timely adjudicated there. What I can --

THE COURT: Well, I have an Illinois lawyer telling me, so, you know, I need some response, I think. That's generally how I deal with this is like the lawyers, since it's their area of expertise, they know their court, you know? How long does it take?

MR. FRIEDMANN: I know from one colleague who

advised me with a matter she had an Cook County that in two years they have not even gotten to summary judgment. So, my guess is that it depends on the type of case, and the nature of the case, and all of that.

THE COURT: Okay.

MR. FRIEDMANN: But I don't know that I'd be asking this Court to put a lot of weight on either of those predictions in terms of what this will take. I'm just certain that -- whereas what I can predict is that because the motion for turnover is up for an evidentiary hearing today, we can hopefully have that resolved in the next couple of hours, which will be much more efficient and much more quick for the estate, than starting to go in Illinois.

THE COURT: It's not teed for an evidentiary hearing today. I have not budgeted time with another 10 more items that are contested on the agenda to have an evidentiary hearing today.

MR. FRIEDMANN: Okay.

THE COURT: Particularly with a motion to strike Mr. Meghji's declaration because he wasn't sufficiently prepared under 30(b)(6).

MR. FRIEDMANN: We're happy to address that as well.

THE COURT: Okay.

MR. FRIEDMANN: The other factor is that I believe

Mr. Gansburg said that there's no dispute that this is an issue of state law. And there is a dispute regarding that because it's actually not a state-specific law. It's actually a debtor-specific law.

The EDA act -- not the Edge Act, which they kept referring to -- the EDA Act is an act drafted by Sears for Sears. That's it. It only affects Sears. There is no other company who's affected by it. It's not an issue that the Illinois state courts have issued many opinions on over the years. It's never been heard by any court anywhere. And it only affects one party, which is the one that's before your court here as the Debtor.

THE COURT: I guess I didn't really understand that argument because even if it were, as you say, a Sears-specific statute, it's still governed by Illinois law.

MR. FRIEDMANN: That's correct.

THE COURT: And it's not like Sears is not a department of the U.S. that's governed by federal law. We're not in the Court of Claims. But in any event, if we were, it wouldn't be a bankruptcy. It wouldn't be bankruptcy jurisdiction. It would be federal jurisdiction.

MR. FRIEDMANN: That's correct, Your Honor.

THE COURT: Okay.

MR. FRIEDMANN: The point really being that there is no -- there's nothing specific about this act --

THE COURT: But that's a point for discretionary abstention, not mandatory abstention, I think.

MR. FRIEDMANN: That's correct.

THE COURT: Okay.

MR. FRIEDMANN: So, also getting back to where we are in the relative cases in terms of timing, so the -- a case was in fact filed on the eve of bankruptcy by the school district, just a couple days later. As of this date, nothing's happened. It hasn't even been -- hasn't been a responsive pleading filed in that case.

So, in terms of where the efficiency is and where things are going to happen most quickly, under mandatory abstention, I don't how there is evidence before this Court that it's going to be timely adjudicated in Illinois, certainly compared to -- even if there's no evidentiary hearing today, if there's an evidentiary hearing at the next omnibus hearing, or sometime before then, we've already had documents produced here. We've already responded to interrogatories. There's been depositions of two witnesses in their individual capacity. There's been a 30(b)(6) deposition. There have been discovery disputes.

All this stuff would have to happen all over again in Illinois.

THE COURT: Why would it? Wouldn't the parties use the same discovery?

MR. FRIEDMANN: My understanding is that my --

THE COURT: They're nodding yes over there.

MR. FRIEDMANN: Well, my understanding is that my friends here have not been very happy with any of the discovery so far here and --

THE COURT: Well, that's different issue.

MR. FRIEDMANN: -- would start all over again.

THE COURT: I mean, they would raise that issue with me too. But --

MR. FRIEDMANN: They can, but --

THE COURT: -- in terms of the discovery that's actually been had, you would start all over again, right? No. And you should say that louder so the record reflects it.

MR. FRIEDMANN: We're not going to waste legal fees repeating ourselves and our school district --

THE COURT: Okay. All right.

MR. FRIEDMANN: That -- well --

THE COURT: And I'm seeing you're raising your rights as to whether it was responsive discovery, but you're not going to start it all over again.

MR. FRIEDMANN: We (indiscernible). Your Honor, we'll move to permissive abstention as well. And I don't know if I'm addressing --

THE COURT: No, I just want to focus on mandatory

--

MR. FRIEDMANN: Okay, sure.

THE COURT: -- at this point.

MR. FRIEDMANN: Yeah, I think from our perspective is there's nothing there we've required -- unless they have put in front of you evidence that this is going to proceed more efficiently in Illinois, which they have not, other than --

THE COURT: I don't think that's the standard. It says timely adjudicated. Now, I do take into account the pressures in the particular bankruptcy case. But -- and I can always revisit it. I mean, I can estimate the -- there are things I could do in this case if it turns out that the Illinois court, for whatever reason, just sits on this.

MR. FRIEDMANN: The issue we have --

THE COURT: But it's --

MR. FRIEDMANN: -- is that right now there are about $9.6 million sitting in an account with the Village that should have been paid out to us --

THE COURT: Well, can I --

MR. FRIEDMANN: -- by the end of 2018.

THE COURT: Could I stop you on that point?

MR. FRIEDMANN: Yeah.

THE COURT: Is that $9.6, is that -- would that all go to this school district?

MR. FRIEDMANN: Not -- no, absolutely not. It's --

THE COURT: Well, why doesn't -- they're the only ones who raised this issue. Why doesn't the rest of it go out?

MR. FRIEDMANN: I don't think anybody else wants to raise the arguments that they raised because there is no merit to them.

THE COURT: Then I don't understand why the rest of it doesn't go out.

MR. FRIEDMANN: Oh, no, it's -- let me back up. We were before Your Honor back in February, I believe, when there was 100 percent of the EDA fund was there. Sixty-five percent of it goes to Sears -- I'm messing the numbers up -- 55 percent goes to Sears, 45 percent goes to a bunch of other municipalities, including the school district.

THE COURT: Right.

MR. FRIEDMANN: At Your Honor's -- I don't want to say insistence, but suggestion, we went back afterwards and reached a stipulation so that the children that we heard about who need security and the budget that (indiscernible) would not be held up by this dispute, and we stipulated to the distribution of that 45 percent to the municipality, including the school. They've had that money since, I believe, January.

The only portion of the EDA funds we're talking about right now are the 55 percent that are earmarked for Sears.

THE COURT: Okay. I don't think my question was clear. That money you say should go to Sears, as I read the statute there is more than one -- if it doesn't go to Sears, there's more than one recipient of it. My question is -- I gathered from the answer I got that 65 percent of that would go to this school district, or approximately that amount. The rest should go to Sears. No one else is asking for that, right?

MR. FRIEDMANN: I think that's probably right, Your Honor.

THE COURT: So, that should happen. I don't see why it shouldn't. I don't understand why that doesn't happen. The school district. It's not fighting for anyone else. It's just the school district.

MR. FRIEDMANN: We made that offer (indiscernible).

THE COURT: So, that should definitely happen.

MR. FRIEDMANN: And Your Honor, I'm reminded by my colleague that the Village actually does have an attorney here today, the Village, on behalf of the Village. So, in terms of why things have or not have happened by the Village, I probably should not be responding on their

behalf. And if you have questions --

THE COURT: Okay. Well --

MR. FRIEDMANN: -- it would probably make sense for them to respond to those.

THE COURT: All right. Well, maybe they want to just see who else got involved. But at this point, no one else has gotten involved. So, it seems to me the rest of the money, the money that's not... I mean, before I deal with anything else, the rest of the money that's not, depending on your point of view, going to go to the Village -- I'm sorry -- going to go the school district, should be paid by the Village or the Town to Sears. Which is --

MR. FRIEDMANN: Agreed.

THE COURT: -- I think, 35 percent, or roughly.

MR. SCHEIN: Your Honor, Michael Schein, Vedder Price, on behalf of the Village of Hoffman Estates. One clarification there. The way the statute works, if any portion of the 55 percent is recaptured, that money -- the money that doesn't go (indiscernible) -- of that 55 percent, the way the recapture works is the Village would share in some of the money that didn't otherwise go on that 55 percent, whereas the Village gets none of the 45 percent under the statute.

So, the question becomes, assuming the parties can all agree on what that number is, as long as we get an order

that's clear as to where that money goes, the Village will--

THE COURT: So, the Village is --

MR. SCHEIN: -- take the Court's direction.

THE COURT: -- reserving its rights to share something?

MR. SCHEIN: Well, we would have -- that's the way the statute's written. So, we have to follow the statutes.

THE COURT: I didn't really see that, but okay.

MR. SCHEIN: That's how it works, because the statute, if you look at 4(g)4(a) --

THE COURT: How do you determine that? The Village has some sort of percentage of the --

MR. SCHEIN: Yeah --

THE COURT: school district

MR. SCHEIN: Well, if you look at 4(g)4(a), besides the 55 and 45 percent, there's another $5 million that goes off the top and it comes to the Village. And then there's a bucket for costs. So, the 40 --

THE COURT: Is that we're talking about bucket?

MR. SCHEIN: No, we're not. But what happens is the way the statute's written, if any of the Sears money is recaptured, as the district's arguing, then Sears at that -- I'm sorry -- then the Village at that point shares. I don't know offhand what that calculation is. I just want the Court to be clear about that.

THE COURT: Okay. Well, you could make that calculation, though, right?

MR. SCHEIN: Yes. We could do it all, as long as we get a direction from this Court to do so, we will do it.

THE COURT: All right. Well, I think you should do that.

MR. SCHEIN: We will, Your Honor.

THE COURT: Obviously, if there's a dispute about it, I'll hear it. But I mean, no one else is interested in this except you two, the school district and the Village.

MR. SCHEIN: Correct, Your Honor. Actually, this dispute is with them. We at the Village are just waiting for your Judge to direct this.

THE COURT: Well, no, you just told me that you want some of it.

MR. SCHEIN: Well, all we're saying is at some point, some of it may come back. It's not a question of want. It's what the statute says.

THE COURT: Well, but no one else has asked for it.

MR. SCHEIN: Correct.

THE COURT: You're asking for it.

MR. SCHEIN: I'm just reserving -- I'm just clarifying on the record that to the extent --

THE COURT: Okay.

MR. SCHEIN: -- we are entitled to a piece of it, I want the Court aware of that. That's all.

THE COURT: All right. So your rights are preserved. You're reserving your rights. But I really believe that the remaining money should go to Sears.

MR. SCHEIN: And Your Honor...

THE COURT: So can we pre-- I don't want to focus on permissive extension for the moment -- abstention for the moment. I want to focus on mandatory. What -- I didn't, as you can tell, I didn't accept the argument that this is a Sears specific statute and therefore it's somehow core, right? I don't really accept the notion that turnover is core unless, again, it's a no brainer.

MR. FRIEDMANN: Well, that adds, I think -- that's our other point, though, Your Honor, is I think it is a no-brainer. I think that you've got a lot of very -- they've got a wonderful team here who've come up with some really creative arguments, none of it is really supported, though, by the statute. So the Recapture Provision 4.5 it just simply says that if we don't have the 4,250 employees during the relevant year that -- it doesn't say that -- what that relevant year is. It doesn't say that it's the year in which the taxes were levied versus the year in which the taxes were paid. That's something that they have read into it, because it would be better for them if it was the year

in which the taxes were paid because then it -- we wouldn't be eligible for it quite yet.

THE COURT: Well, why aren't you also reading into it?

MR. FRIEDMANN: What we're doing is we are treating it the same way it's been treated year, after year, after year by the Village and Sears with nobody ever raising an issue. So every year, what happens is the taxes are levied and, you know, so in this instance they were levied in 2017, those taxes -- and they're paid in arrears. So in the early part and middle part of 2018 they're paid for 2017 and typically by December. And in the record we've got -- showing both in the last two years this has happened, so by December of 2018 there would have been a board meeting and resolution of the Village to make that payment and distribute that payment.

So what does that tell us about what year is relevant? Well, if the Recapture Provision allows you to withhold payments in any month in which we were not in compliance, if they're meeting in December 2018 regarding 2017, they can make a decision about every month in 2017. What they can't do in December of 2018 is make a decision about every month in 2018, and that's the way it's worked every single year going back as far as we've seen records for. Is that it's that following year after collecting the

funds, they go back and say, was Sears in compliance? They were, then the Village authorizes the payment to be made, often enough in that same year, in that same year which the taxes were collected, the taxes are reimbursement is paid, so the course of dealing between the parties.

We also, again, we have Mr. Schein here from the Village who can confirm our understanding and the understanding between the only two parties to this agreement, which are Sears and the Village. And the Village does not disagree with any -- I mean, the Village, as you saw, did not file any kind of objection to our motion to turn over funds that they're holding, even though, frankly if we're wrong it's to the Village's benefit because that money goes, amongst all the municipalities, they're one of them. But they didn't file any response because they would have been saying something that's not accurate.

They don't challenge our compliance in 2017. They don't challenge that 2017 is the right year to be looking at for these funds, the year in which the taxes were levied. They don't challenge that the way in which the employees were counted was appropriate, which employees in terms of what --

THE COURT: Well, you say "they" you're referring to the Village?

MR. FRIEDMANN: The Villages.

THE COURT: Right.

MR. FRIEDMANN: Excuse me. Sorry. To be more specific.

So I don't think there really is a genuine dispute here at all. You have an opportunistic school district who, in addition to getting the 45 percent we already agreed to make sure that that was distributed to them and was not held up by their own litigation, they have that money, now they're looking for, as Your Honor put it, a windfall. This is above and beyond what they could have reasonable have expected to get when they put their budget together, and they're taking a shot at it. And, you know they're lawyers and that's the way lawyers make money, so I get it. But there really is no legitimate basis in the case law, other than their creative lawyering.

Let me address one final thing on that is, you know, they suggest that the record is not clear and Mr. Meghji's deposition, he wasn't prepared for. This is the reality of being in bankruptcy, Your Honor, is that all the employees who worked there in 2017 unfortunately are no longer all employed by Sears. So the two women who were responsible for contemporaneously keeping track, on a monthly basis, of our compliance with the EDA Act are not there anymore. Luckily all of their documents and records are, so Mr. Meghji, as CFO -- CRO of the company, excuse me,

gathered all those documents, went through them and was able to see that consistent with what Sears confirmed to the Village, in real-time, it was in compliance in every month in 2017.

So what has been produced and what Mr. Meghji was able to testify is the best available evidence and it's unrebutted. There's not -- it's not as those there's some email that says, oh no, we're really not in compliance, what are we going to do. There, by the way, certain are email that say, we better we careful, we're learning -- we're losing a lot of employees, we've got to track this carefully because in the future we may not be in compliance. But there is no evidence whatsoever suggesting that at any point in 2017 they were not in compliance.

And really, at the end of the day, it's a counting exercise. This is not a complicated issue. You count from 1 to 4,250 and when you hit that number you can stop because you're in compliance. You certify that to the Village and the Village turns over the money.

THE COURT: And that's with actual Sears employees, not third parties?

MR. FRIEDMANN: So, it depends on the timing. So in 2017, certainly the beginning of 2017, they were relying solely on Sears employees at the Hoffman Estates campus. And the numbers were significantly above 4,250 so as long as

they knew -- and then the actual number didn't matter, they didn't have to certify that to the Village, they had to certify that we are above the number. So there were enough employees, full-time employees at Sears at the time, they were fine. As the year went on and as they started getting closer to that number, they started including, and there's nothing in the EDA Act that prevents them from doing so, they included other full-time employees that were also at the Hoffman Estates campus, and that includes the --

THE COURT: Employees of Sears?

MR. FRIEDMANN: They're not employees of Sears, they're employees who work at the EDA.

THE COURT: All right.

MR. FRIEDMANN: Which again, the -- there was discussion about the Edge Act and the EDA Act --

THE COURT: And this was in 2017?

MR. FRIEDMANN: This was for 2017. So in 2012 it wasn't just -- the EDA Act and the Edge Act were both amended. Same piece of legislation, amended them both. In the Edge Act the language was they required Sears to "employ a minimum of 4,250 full-time employees at its corporate headquarters in Illinois at the time of the application." Employ. In the EDA Act, amended at the same time, same legislation, uses very different language it says, "Sears is required to maintain 4,250 jobs," they don't have that same

language "employed" because there never was an understanding or a requirement that Sears employ all those people. The idea was Sears came out of the Hoffman Estates, which at the time was Prairieland, put $100 million or so into that area and now they're being reimbursed for that. Not just because it created Sears jobs, but it created jobs for probably a lot of the parents of the kids that lived in -- live in the Hoffman Estates area, whether or not they work for Sears or work for some other company that, you know, was spurned by the fact that Sears had moved there.

So there is not that requirement. And once again, as the Village can confirm, there's no dispute, as between Sears and the Village, that it's not limited to just Sears employees. In fact, it's not only limited to Hoffman Estates. You could count employees in the entire EDA, and Sears never did that, because it wasn't necessary. Once they got to 4,250 they stopped counting. If it was necessary to count through the entire EDA, they could have done that they would have been even that much more over the threshold.

But our view, Your Honor, is that there's no real bona fide dispute here because neither the statute has the language that the school district wishes it had, and in terms of the numbers, they're there, they are what they are. And it was counted contemporaneously, they're in business

records and it -- and Sears --

THE COURT: Well, the numbers for the Sears employees.

MR. FRIEDMANN: Well, the numbers are in there for both Sears employees and they also kept track of the non-Sears employees. They're all working at the Hoffman Estate campus, so all these employees had to get registered badges through the, what was it, real estate office, at Hoffman Estates. So Sears actually was able to easily keep track of every -- all of the employees at the building, not just Sears.

THE COURT: What about the school district's argument that it shouldn't count part-time employees?

MR. FRIEDMANN: They did not count part-time employees. That's actually -- the documents that were produced reflect they were only counting full-time employees. Now, by the way, I know the Village takes the position that part-time employees could have been counted, there's nothing that restricts Sears from doing so under the EDA. Because they were using information from the Edge Act that they had already collected, which had more restrictions on it, they limited themselves to only counting full-time employees. And the materials, the term "scrub" that was used before, that was one of the things that was done, is they would scrub it to make sure that they were only

including full-time employees.

THE COURT: Okay.

MR. FRIEDMANN: Thank you, Your Honor.

MR. GENSBURG: Your Honor, may I address just a couple matter? I think this dialogue that I -- we've had sort of establishes that this is simply not a statute that's going to need clarity, as I said earlier.

But I want to point out a couple things. First of all, Mr. Friedmann mentions past practices. You might recall we had sent a letter to the Court about our ability to get documentation from prior years and they objected saying that 2017 was the only year that's relevant. And now he's arguing about years' prior past practices. We've never been given those documents, we've asked for that stuff, haven't been given it and so I don't think it's appropriate that he makes that argument right now.

He makes a point about how the Village's silence is somehow acquiescence. I'm not sure how you read that into it. You know, we've been active on this, and the Village has been watching us and they know what's going on. So their silence may be, you know, guys go for it, we're supporting you. I don't know what it is. Or it could be the fact that the Village gets -- as long as the EDA Act remains in effect gets $5 million. And then once the Act disappears, because it's noncompliant, that $5 million goes

away. So it could be one of those two things, or maybe it's a third, I don't know.

THE COURT: Where does it go?

MR. GENSBURG: It goes to the other taxing districts. The $5 million is their take under the EDA Act while its in place. And that's -- you know, if you were a cynic you would say, well, that's why the Village is not doing anything about this. Or maybe they're looking at me and saying, go for it, Gensburg. I don't know. But I think the mere fact that they're silent is not necessarily acquiescence and agreement.

Mr. Friedmann says that there's a -- that there was -- there's no --

THE COURT: Well, there's no -- isn't there -- I mean, Sears had to certify compliance, there's no document where they accept certification?

MR. GENSBURG: Sears -- when you -- in actually attaching some of the documents Sears sends a certification letter that basically says, we've complied.

THE COURT: Okay.

MR. GENSBURG: And the Village says, great. The Village doesn't say, well, give the detail about how you complied.

THE COURT: But is -- I guess my point is, isn't saying, great, enough to mean that they've agreed?

MR. GENSBURG: I don't -- yeah, I don't think -- you know, the problem with those letters is the years. So Sears -- the Village was saying, give us data in 2017 for 2017, 2018 for 2018 and so there's that discrepancy. But I think, quite frankly, Your Honor, that the Village would be thrilled to allow the EDA Act to remain in place because they make money off of it. And that's the $5 million. I don't know if that's what Michael Schein was talking about, but that's the $5 million. Once the Act disappears, that $5 million goes to all the taxing districts, it's not funds that are just to the Village, which is a product of the statute that Mr. Florey or Mr. Atkinson can walk the Court through, if you want a little more detail on that.

And the problem with the 30(b)(6), you know, he says, Mr. Meghji, all the employees are gone. Well, you know, 30(b)(6) is hard, it requires you to inform yourself. And when you look at the case law that deals with 30(b)(6), you can call them employees or nonemployees, you just have to inform yourself. And most of these employees are at least employees under the agreement. I'm not sure why this is so difficult. But the bottom line is, just saying there was a methodology, and I can't tell you what it is, doesn't inform me. I have no idea how you determine that the people at Sbarro's who make the pizza for lunch are full-time employees.

The other problem is, is that when you look at the documentation that was provided in his declaration, Your Honor, they refer to active badges for the Sears employees. But there's also a column that says "daily swipes of associates," which is employees. It's half that number. So there's active badges of 4,300 and the daily swipes are 2,100. And we asked him about that and he says, I don't know, I didn't look at that.

The fact that there's a lot of active badges and the company is shrinking dramatically doesn't necessarily mean there's 4,300 full-time equivalent employees, the point being there's a lot at issue here that needs to be resolved. This is not a frivolous dispute, by any stretch of the imagination.

THE COURT: Let me ask your colleague, we talked about, at the trial level -- at the appellate level, what is your sense of getting -- let's assume there is contested, up to at least the intermediate appellate court, what would that time take?

MAN 1: Well, there's also an expedited proceeding in the appellate court as well.

THE COURT: Right. But can you just give me a ball park sense?

MAN 1: Again, an election case is probably the best example where there's a critical need to get the answer

quickly, and it can be done in less than four months. You have an expedited briefing schedule, you have an expedited hearing schedule. Most appellate courts don't take oral argument, they just render the decision. And if the direction was clear from this Court to be on -- you simply have to request to be on the expedited calendar.

THE COURT: And that applies to matters like this?

MAN 1: If --

THE COURT: If the parties --

MAN 1: -- we will inform --

THE COURT: -- request it?

MAN 1: Not just the parties but this Court. They're going to understand that this -- there's a need for expedited action so that we don't hold up any element of the bankruptcy case. That alone is enough to get the trial court to expedite this to get the appellate court to expedite it.

THE COURT: Okay.

MAN 1: Thank you.

THE COURT: All right.

MR. FLOREY: Your Honor, I just want to clarify a few statements made on the record that the district raised.

First and foremost, the Village's responsibility is to comply with the statute, and what's most important is the district noted in its papers, the statute does not give

the Village any audit or certification rights. So the Village is not with the power to go ahead and verify. It has no authority to go ahead and verify. Prior to 2018 no one disputed Sears' letters, Sears' statements, all the Village did, in good faith, was, are you in compliance and Sears said yes and we distributed the monies as the statute directs us to do. It is only just before this case and in 2018 that the district, or any party, let alone this district, any district has disputed.

As a result, the bankruptcy happened, we are stayed. We came to this Court with the parties to distribute the 45 percent that no one had an issue, and we're here today asking this Court to make a determination, or if it's going to be the state court, whoever it is, just to tell us what to do with the money. It is not for us to make that interpretation. You, or another judge, are wearing the robes, its not for the Village.

As for a conflict of interest, which we take personally, if any of this 55 percent comes back, it actually goes to the Village. So the Village would get a piece of that, but right now we don't, so saying that we're in favor of the Debtors or not in favor of the Debtors, it would show that we, the Village, would not -- supporting the Debtors, which we're not taking a position one way or another, that's why our silence is here, Your Honor.

And finally, the EDA Act, as we understand it, just doesn't go away. What they're fighting over now is 4.5(b) which is the statute within a section of the EDA Act dealing with Recapture. The EDA Act is still in effect, we're still required to comply. There is also an EDA agreement, Your Honor, and really what that agreement was is when this project was developed that was the basis to fund the project, with -- most of it was funded by Sears. And what is being paid now is not really a subsidy, it's a reimbursement of the advancement of the costs to Sears, that is what the statute and the agreement is.

We also, probably, Your Honor, to give you a heads-up, may very well be back before you at some point for this year, depending how this Court or any other court rules, because we have the issue of the EDA agreement is up for assignment to the buyer, Transform Holdco. So we're only dealing with 2017 levy and the money we're holding. We are collecting and will be collecting from the Cook County Treasurer this coming year's tax revenues from 2018 taxy levy. So we may eventually face this issue again. I just want to let the Court know that.

THE COURT: Okay. All right. Okay. I have before me a motion of Community Unit School District 300 for a relief from the automatic stay, or in the alternative, for abstention.

The motion was actually filed before there was anything really, I think, to abstain from, although since then the Debtors have filed, and this is on for today's calendar as well, a motion for turnover of property that the Debtors contend is its property that's currently being held by the Village party to the EDA Agreement, the Village of Hoffman Estates. And I'm applying the abstention piece of the motion to that turnover motion, i.e. that it is the turnover motion that I am being asked to abstain from.

The motion seeks abstention on both a permissive and a mandatory basis. 28 USC Section 1334(c)(2) provides for a mandatory abstention. "Upon timely motion of a party in a proceeding based upon a state law claim or state law cause of action, related to a case under Title 11, but not arising under Title 11 or arising in a case under Title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section." The section referring, generally, to Section 1334, which pertains to jurisdiction of bankruptcy cases and proceedings.

Under those circumstances, continuing on with the statute, "The district court shall abstain from hearing such proceeding if an action is commenced and can be timely adjudicated in a state forum of appropriate jurisdiction." Under the general order of reference the issues before me is

to the district court.

Accordingly, Section 1334(c)(2) requires, requires that is, abstention where the motion to abstain is timely filed, the underlying is proceeding is based on a state law claim or cause of action, there's a lack of a federal jurisdictional basis, absent bankruptcy, the action is commenced in a state forum of appropriate jurisdiction, the abstention will result in a timely adjudication and the proceeding is noncore for purposes of 28 USC 157(b), in that it would not arise under, or arise in -- arise under Title 11, or arise in a Title 11 bankruptcy case. See In Re: WorldCom, Inc. Securities Litigation, 293 B.R. 308, 331 (S.D.N.Y. 2003).

Regarding the timely adjudication -- or subject to timely adjudication requirement, there appears to be no definitive standard for judging whether an action is capable of timely adjudication. However, it is reasonably clear that the cases that address the issue focus on the needs of the Chapter 11 case and not an absolute time frame. See Paragraph 3.05, Collier, 16th Edition, 2019, i.e., the Court should not simply look at an objective argument as to whether courts in the nonbankruptcy forum adjudicate their cases within a certain time frame, but rather how the time frame in which they adjudicate those cases relates to any urgent needs of their particular Chapter 11 case where the

bankruptcy court -- over which the bankruptcy court is presiding.

The only basis for bankruptcy jurisdiction here that is not related to jurisdiction, but rather core jurisdiction, is the Debtor's argument that the money at issue, which is being held by the Village of Hoffman Estates, is clearly property of the Debtor's estate and therefore must be turned over, under Section 542 of the Bankruptcy Code, and that the movant school districts attempt to prevent that turnover is a violation of the automatic stay under Section 362(a).

That would clearly serve as a basis for defeating the mandatory requirement under Section 1334(c)(2) if the issue, indeed, were clear. I conclude, however, based on the record before me, that the issues underlying the dispute as to the reallocation of the funds at issue under Section 4 of the EDA, is not clear and would require adjudication on issues that cannot be decided on a clear basis.

The Debtor relies heavily on the fact that the recipient of the funds and the entity to whom the Debtor's compliance with the EDA and its requirement that a certain level of jobs be maintained for the year at issue has accepted that certification. However, it is not clear to me that that acceptance, which in fact is not an agreement, but merely a lack of, at this point objection, qualifies as a

binding determination or waiver that would control here over the interests of the school district, which is a residual beneficiary, if in fact Sears failed to maintain 4,250 jobs at the EDA for the year in question, 2017.

The school district argues, to the contrary, that the Debtor is using figures from the wrong year, which is not specified in the actual statute. And secondly, to the extent its relying upon figures that include jobs that are not jobs of direct Sears employees, the statute is not clear on its face that that is the right method for calculation.

I believe that under the case law, considering 542 as a basis for core jurisdiction in the mandatory abstention context, a Debtor needs to show more than that it has a good shot at winning, or is likely to win. Rather, it needs to show whether there's a bona fide basis or it is clear that the Debtor will prevail. And I did not believe that the Debtor's pleadings to date rise to that level of assurance or lead me to rise to that level of assurance.

That leaves the issue, which I believe the Movant, as with all of the factors in Section 1334(c)(2) as to carry the burden of proof that the right to the funds being held by the Village can be adjudicated on a timely basis by the State Court. When I consider timeliness here, I'm very much motivated by the concern that the Sears Debtors are on a fairly thin margin as to the ability to pay administrative

expenses and, therefore, also, on a fine margin in their ability without the consent of administrative expense creditors to confirm with chapter 11 plan. It's important for the debtors to proceed promptly to confirm a plan which requires them to determine their sources and uses of cash as a condition precedent to that. The Debtors have targeted an outside date to do that, of July of this year, which to me does not reflect wishful thinking, but rather is important to do. And I believe that the money at stake here, several million dollars, is an important component of that analysis.

So, timely adjudication, I review in that context. I have been told by an active member of the Illinois Bar who practices in this area, that with proper guidance from the parties as well as this Court, the Illinois Trial Court, as well as the Appellate Courts, would likely treat this matter on an expedited basis. Counsel for the movants has represented to me that under those circumstances he believes there would be a final ruling on the merits of the issues before me, which I briefly summarized, and which are well set forth on the record within approximately 60 days of my ruling on abstention, and that there is an expedited procedure for appeal as well.

The Movants have also represented to me that they would act to expedite the process and not to delay it, including, for example, using discovery that has already

been produced in seeking expedited treatment. Based on those representations I conclude that the matter can be timely adjudicated, although I reserve my right to reconsider my decision if it turns out to the contrary, that the timeline for adjudication is not a matter of several weeks, but rather several months or longer. But based upon the record before me, I will abstain under Section 1334(c)(2). I believe there are at least colorable issues going to the merits here, based on, A, the choice of year for the certification and, B -- although this may never be relevant, depending on the answer to issue number A, or issue A, whether the statute permits the developer to include in its calculations of jobs maintained, jobs of workers who are not direct employees of Sears, and the evidence to support that. But I believe that given those colorable issues I'm required to have the State Court decide those issues, again, on the conditions that the Movants have agreed to on an expedited basis.

So, I'll ask the Movants to submit an order to that effect and you don't need to formally settle that order, but you should provide a copy in advance to counsel for the Debtors so they can be sure it's consistent with my ruling.

I'm not deciding today whether the stay was violated. That's really an issue that will come up at the

end of the day. But I'm obviously permitting the underlying facts to be decided by the State Court.

MR. FRIEDMANN: Your Honor, just a point of clarification. With respect to the 40 percent that is not issue, should that same order be addressing that? Do you want a separate -- I know it's important to the Village to have something?

THE COURT: No, I think there should be a separate order. It's really a separate issue. I don't want to have that hold up this. I just think it should proceed promptly. And I also want to make it clear that what I'm abstaining on is the turnover motion. The litigation should not delve into the State Court litigation and decide the merits of the claims that have been filed in this case for reallocation for prior years, or for the future. I'm hopeful that there may be clarification, based on the State Court's decision, that will inform those issues on a collateral estoppel basis, but the only thing that's going to the State Court is the particular issue of the right to the money that's being held, that would otherwise go to the school district itself, by the Village.

MR. FRIEDMANN: And Judge, you asked earlier about how do we figure out how much goes back to the other taxing districts, all of a certain percent.

THE COURT: Right.

MR. FRIEDMANN: It's very easy mathematics if you figure out what goes.

THE COURT: So, the only issue is what part the Village keeps on account of your piece.

MR. FRIEDMANN: Whether they keep it or their silence gives it to Sears.

MR. FLOREY: Yes, Your Honor, just for clarification, we'll work with both of them. They'll do the calculation the Village technically has to go through a finance committee and a board committee process which we'll expedite to get that completed and submit an order.

THE COURT: And if Sears disputes what should be retained by the Village at all, I just suggest that you guys leave that issue open.

MR. FLOREY: Thank you, Your Honor.

MR. FRIEDMANN: Your Honor, on the motion to strike, I guess that --

THE COURT: It's irrelevant. It's moot.

MR. FRIEDMANN: Withdraw without prejudice.

THE COURT: Because it's not my issues.

MR. FRIEDMANN: Right. Thank you, Judge.

THE COURT: In other words, I decided this issue without my consideration of Mr. (indiscernible) declaration one way or the other. Okay.

MS. MARCUS: Good afternoon, Your Honor,

Jacqueline Marcus, Weil Gotshal & Manges on behalf of Sears Holding Corporation, its affiliates. The next item on the agenda, I believe is number five. It's the motion of the Trustees of the Estate of Bernice Pauahi Bishop to compel payment. As indicated on the agenda, that matter has been adjourned, but Mr. LeHane would like to address the Court.

THE COURT: Okay. This is the Hawaiian store.

MR. LEHANE: That's correct, Your Honor. Robert LeHane, Kelley Drye and Warren, on behalf of the Trustees of the Estate of Bernice Pauahi Bishop, which does business as the Kamehameha Schools. As Your Honor may recall, this estate really is a school system. Ms. Bishop left all of her estate to the children of Hawaii. There is a significant shortfall in the rent. The rent increased in July of 2018 by fourfold. And the Debtor has been paying approximately 26 percent. As of April 1st, the total shortfall is $1.646 million. We agreed, at the last hearing, at the request of Transform and the Debtor to adjourn the matter. The Debtor did agree, in connection with that adjournment, to put $500,000 into escrow as adequate protection for the rent shortfall, and we very much appreciate that.

They, again, asked for an adjournment of this hearing because, at the time they made the requests, they still were not sure the treatment of the lease.

Subsequently, we were informed by Transform, as was the Debtor that they were going to reject the lease, that the store will be closing.

We're in the process of negotiating with Transform what we believe may be a short-term lease that will allow for that to be a more orderly process than closing the store by the deadline to assume or reject on May 15. The Debtor has agreed to add another $250,000 to the escrow and we appreciate that. That is a percentage of what would be allocated to the Debtor's share of the time during which they've been in the premise. From and after the closing, really is the obligation of Transform and we would reserve the right depending on how discussions go during the next several weeks, to seek further adequate assurance from Transform, which would be related to the time that they've been in the premises, and base rent and tax obligations that have come due since then.

THE COURT: Under the APA, in essence.

MR. LEHANE: Yeah, under the APA, that's correct, Your Honor. And what we've also discussed is we're adjourning this to June 20, but with the understanding that we really will try to resolve this. If the parties are unable to make significant progress in the next several weeks, we will be submitting a scheduling order for the May 21, and use that as a status conference.

THE COURT: Okay.

MR. LEHANE: So, that if we have to come back here before Your Honor, we would like that to be an evidentiary hearing. In fact, we have folks from Hawaii ready to come out for today. I obviously don't want to make that trip, frankly, if we don't have to, or more than once, Your Honor. So, that's essentially the update. Sorry to hear that this store is going to be closing much sooner than we thought it would, but we hope we can resolve this. To date, we've heard no real substantive response to the issues that I think were raised in our original motion. So, we thank you for that, Your Honor.

THE COURT: Okay. Very well. Thanks.

MS. MARCUS: I'm glad we've picked up the pace a little bit. The next item, Your Honor, is the motion of Dedeaux Inland Empire Properties to compel the debtor in possession to assume and assign or alternatively to reject. It's Item Number Six on the agenda.

MR. FENNELL: Good afternoon, Your Honor, William Fennell on behalf of Dedeaux and on the Empire's. Your Honor, I believe that we have accomplished what they sought to accomplish, which is communication with both Transform Co. and the Debtor. Literally at the 11th hour last night, we had a conference call and I was informed that the Debtor had been informed formally that Transform Co. will seek to

assume its contract and, therefore, I understand that one of the parties for the Debtor or for Transform Co. is willing to put that on the record today. It doesn't resolve the cure issue items and we're hopeful that those could be done promptly and in conjunction with the master services agreement for the facility, but that would be left for another day.

THE COURT: All right. So, it is on the, it's now on the assigned list.

MS. MARCUS: Your Honor, I believe it was on Friday but it may have been on Thursday of last week, before the designation rights period, and with respect to this lease. We did get the notice from Transform that they are designating this lease for assumption. We have not yet formally -- we've kind of shared the work between transform and the Debtors in terms of filing the notices with the Court. And I believe that Transform's counsel is going to actually file the formal notice.

THE COURT: So, this motion is really moot then.

MS. MARCUS: From our perspective it is, Your Honor.

THE COURT: I mean, I'm not sure I would have granted it, given the statute, but it's moot.

MS. MARCUS: I was going to make the argument, but given the time, I'm not going there, Your Honor. Thank you.

THE COURT: Okay, very well.

MR. FENNELL: Is there somebody from Transform who can confirm.

THE COURT: The counsel is here. They're not disputing what you say.

MR. FENNELL: Your Honor, I will have to confirm with their office. I'm sure, I mean we're working very closely with Weil on this one but --

THE COURT: I accept the Debtor's representation.

MR. FENNELL: I do too.

THE COURT: They're aware of the whole process here.

MR. FENNELL: Understood, Your Honor, but that wasn't completely transparent to us, but we understand from last evening and today's representations. Thank you.

THE COURT: Okay, very well.

MS. MARCUS: The next one, Your Honor, number seven, is the motion of Maudlin At Butler LLC for payment of administrative expenses, and their counsel will handle that.

THE COURT: Right.

MR. GOODHOUSE: Good afternoon, Your Honor. Brendan Goodhouse, Cutty & Feder for Maudlin At Butler, the landlord. This motion is for the payment of property taxes that came due in November of 2018.

THE COURT: Well --

MR. GOODHOUSE: When --

THE COURT: I'm sorry, go ahead.

MR. GOODHOUSE: Sure. I just wanted -- some housekeeping -- it's in the papers, but just so we're all on the same page. When we first made a motion, the claim was for $88,660.08. Subsequently, we learned that the Debtor had made a partial payment of those taxes in the amount of roughly $19,000. So, the amount outstanding is $69,713.54.

THE COURT: And the Debtor contends that that payment is in respect of the pro-rated post-petition portion?

MR. GOODHOUSE: Yeah. Essentially, so, what the dispute comes down to is, the Debtor's position, and obviously they can state it better than I will, but that the roughly $70,000 that's unpaid is not properly categorized as administrative expense. It should be considered a prepetition claim because it's applicable to the earlier part of 2018.

THE COURT: The taxes themselves accrued pre-petition?

MR. GOODHOUSE: The taxes -- yes, that's right. So, what we really come down to is just, I think, it's a statutory interpretation argument. And the key provision is section 635(d)(3) of the code.

THE COURT: Three sixty-five.

MR. GOODHOUSE: What did I say? Sorry about that.

THE COURT: You transposed a couple of numbers, no problem, 365(d)(3).

MR. GOODHOUSE: My temporary dyslexia; apologies. It requires timely performance of obligations of the Debtor arising from and after the order for relief under any unexpired lease of nonresidential real property until such lease is assumed or rejected. Not many courts have actually directly addressed this question here, where what you have is property taxes that aren't billed until the end of the year, which is what the case is in South Carolina, at least in Greenville County, South Carolina, where what you have a lease obligation that comes up following the petition. But the tax period covers both prepetition and post-petition periods. The question really boils down to, do you read Section 365(d)(3) and give a plain meaning to those words, or do you find that there's ambiguity in there, and starts taking to account certain policy considerations that may adjust how you're going to read this. And you have different -- different Courts have come to different conclusions on this issue.

Now, the Debtor's notes the In re Child World case, which found, as they would like Your Honor to hold here, that the portion of the taxes applicable to the prepetition period would not fall under 365(d)(3). But then

about three months after that case came down, the In re RH Macy case came down where Judge Sotomayor looked directly at the Child World case, considered it and, I think in sum and substance, that ruling came out to be -- I understand the policy considerations being discussed in the Child World matter. I'm not going to read ambiguity into words of the statute where I see none. And it's really, you know, it's the same thing, and I took note of it when you were issuing the decision on the first motion here, in discussing the rules and interpretation of contracts. And it's really no different with statutory language. Yes, you have to consider overall policy objectives, and you have to consider the totality of the statute. But that doesn't override the actual words. And just because two parties had different understandings of their meanings, doesn't mean there's ambiguity there.

Now, I think, frankly, what seems to me at least to be the critical decision here is the term 'arise.' Does the obligation arise prepetition as the taxes are accruing or does the obligation arise post-petition when the county says the taxes are due, and then when they're do under the lease? And I think the plain English meaning of that is, it doesn't arise until the county says it's due, and it doesn't arise under the lease until the payment is due. So, here, the contrary example, or the example is, if Mauldin had,

some time in 2018, gone to K-Mart and said, "We want you --," for whatever reason, because they knew the bankruptcy was brewing but that's really irrelevant; if they said, "We want you to make a payment on your 2018 taxes," K-Mart would have properly said, "No, we have no obligation to do that." That obligation doesn't arise under the lease until the county bills them. So, it's -- and the other --

THE COURT: Of course, that's what Judge Posner had a real problem with. He said it didn't make any sense, that very fact (indiscernible), and that's why he said in Handy Andy that this can't be what --

MR. GOODHOUSE: In Handy Andy, yes, I understand --

THE COURT: -- this can't be what Congress meant.

MR. GOODHOUSE: And the Third Circuit has gone other way on it. So, both parties in their briefing, obviously, focused on this jurisdiction.

THE COURT: So, you have some real heavyweights talking here, right?

MR. GOODHOUSE: So, you do --

THE COURT: Posner, Sotomayor.

MR. GOODHOUSE: -- certainly above my pay grade. And the last thing --

THE COURT: Right. But actually, she recognized too that it was kind of the logical ... But I don't think

anyone argued to her that the statute may have been just a timing issue; not the timing of accrual versus arise, but the fact that you actually have to pay.

MR. GOODHOUSE: I think, in that case, Judge, actually, the parties' argument seemed to focus more on the term 'obligation' than 'arise.' I found that in looking at some of the subsequent cases 'arise' struck me as being the key issue here. But one thing I would note about the policy --

THE COURT: But I think that the point is -- and actually, I think Judge -- I think it was Judge Sweet, another heavyweight, in the Loews case, talks about -- yeah, it was Judge Sweet -- talks about the focus of the statute being on immediate payment, not so much on the world 'arising' and he distinguished the situation in Lowe's from the situation where taxes would be accruing over time, even if they're payable as of one date. So, I'm going to cut this short. You want to brief this very well. This is an issue that is clearly not decided in the Second Circuit yet, and I believe it can go either way. And my view is that this should be pro-rated here, that the full tax bill isn't required to be paid under 365(d)(3). And I think that's the majority view of the cases, generally. I wouldn't limit it just to tax bills. I think you have to look at things that accrue over time. And you're absolutely right, there are

circuits that go the other way. In fact, even though the majority of courts apply the accrual analysis, the majority of the circuit courts go the other way. But I think Judge Posner actually does a really good job of analyzing it in Handy Andy Improvement Centers 144 F.3rd, 1125 Seventh Circuit 1998. And I do think it depends a lot on the particular obligation, but I think with accruing taxes, which is what Handy Andy covers, and of course with Child World and Macy's did too, on contrary District Court opinions, the better view would that Congress was trying to do a lot of things in 365(d)(3), but the main ... but I don't think it was intended, and I don't think the language requires that tax bills that accrue over the length of the prepetition period, as well as carrying over the post-petition period have to be paid under 365(d)(3). And I think the Urban Realtek Properties versus Loews Cineplex Entertainment Corp case 2002 US District LEXUS 6186, April 9, 2002, goes into this in some detail at pages 18 -- I'm sorry, 17 through 24, where Judge Sweet recognizes it's appropriate to pro-rate in some cases, particularly taxes, but not in that case where there was one overall payment.

I recognize that CenterPoint Properties, In re Montgomery Ward, goes the other way; 268 F.3rd 205 Third Circuit 2001, as well as, of course, the Macy's case. But I think the majority of the cases doesn't, as discussed, for

example, in In re Rothman 2007 Bankruptcy LEXUS 2651, Bankruptcy EDNY August 2, 2007. And also note that, for what it's worth, the ABI Commission on reforming the Bankruptcy Code sided with the pro-rating courts as to how the landlord's claim against the estate should be treated. See First Glance: Legislative Update ABI Commission, Creating More Certainty in Chapter 11 for All Parties, 34-4 ABI Journal 12, April 2015. The recommendation is actually at the very end of that article. So, I just think that the statute is sufficiently ambiguous to look at the overall bankruptcy policy. This is a lease that was rejected ultimately, right?

MR. GOODHOUSE: Yes.

THE COURT: So, we look at 502(g) and 365(g), and I'm going to deny your motion.

MS. MARCUS: Number Eight on the agenda is actually one of the Debtor's motions. It's the motion of the Debtors for entry of an order authorizing and approving procedures for settling de minimis affirmative claims and causes of action of the Debtors.

Basically, Your Honor, what we've proposed is a procedure that would expedite the Debtor's ability to enter into those kinds of settlements. We have discussed it and actually run the procedures by the Creditors Committee. The Creditors Committee made comments. We responded to the

comments and those comments are reflected in the proposed procedures. Essentially, we're seeking authority to settle claims that have a settlement amount of less than $5 million.

We received only one objection to the motion. That was the objection of Wilmington Trust, the successor indentured trustee, with respect to the 2010 notes. Wilmington asserts two objections. First, that the Debtors have not provided any evidence of how many de minimis claims may exist and may be resolved before plan confirmation. Given the size of the Debtors' estates and the compressed period in which these cases have taken place, I don't believe there's anyone who can guess as to how many claims there would be. Frankly, I don't know that I have one that I can think of today, but we do think it would be in the Debtor's estates and it would also assist the Court if we were to approve these procedures. There's no downside to doing it, so if there were five or if they were 100, I don't think that would make a difference.

The second objection asserted by Wilmington is that given the replacement liens that they were granted under the final DIP order, they should not be excluded from the opportunity to review and object to the proposed settlements. Again, we're talking about the settlements that are under $5 million. On this, Your Honor --

THE COURT: I'm sorry, say that again, a settlement ...?

MS. MARCUS: Settlements that are less than $5 million, because settlements that have an amount more than $5 million would be subject to the normal noticing procedures. I think in the last line of their objection, Wilmington says, "Include us as a noticed party on those de minimis settlements." The Debtors' perspective is that we leave it to Your Honor. I think every time we add another notice party on these kinds of matters, we're increasing the cost and the delay and the hassle, frankly, of getting this stuff done.

THE COURT: Although I think they're right -- I mean, they're the fulcrum security, arguably, so I would include them in indentured trustee. You don't have to give it to every bond holder, it's just the indentured -- the collateral agent and indentured trustee.

MS. MARCUS: Okay.

THE COURT: On the first point, these are -- it doesn't say what you settled them for, right, it just says settlement?

MS. MARCUS: It says settlement amount.

THE COURT: The settlement amount.

MS. MARCUS: So, if the claim is one where the other party -- and we didn't seek authority to actually make

payments on any claims because these are affirmative claims that belong to the estate. So, if the amount that the estate is going to get is less than $5 million, then we don't need to -- we only notice the US Trustee, the Creditors Committee and Wilmington Trust.

THE COURT: Okay. All right, Mr. Fox, you have anything to say on this one?

MR. FOX: No, Your Honor.

THE COURT: Since you were on the second part.

MR. FOX: Yes. So, I don't have any -- we made a motion as the collateral agent as well, which was for the entire --

THE COURT: That's right. I keep saying -- it's in both capacities.

MR. FOX: Yes, thank you, Your Honor.

THE COURT: Five million dollars is a lot of money, obviously. There needs to be some review as this motion provided for. And I think that the motion itself was properly noticed under the case management order. The only party that objected was the second lien trustee and collateral agent. I take that very clearly to mean that other parties of interest are comfortable with this procedure. But I believe given the position of the second lien debt in the capital structure that it should be also a notice party. And with that change I'll grant the motion.

MS. MARCUS: Okay, Your Honor, we'll revise the order and submit it to chambers with a copy to Mr. Fox in advance.

THE COURT: Okay.

MS. MARCUS: The next item on the agenda is the motion of Winners Industry.

MR. SMITH: Good afternoon, Your Honor, James Smith from McKool Smith on behalf of Industry Co. Winners originally moved for motion to grant administrative expense priority for the goods that Winners sold to Debtors that were received by the Debtors post-petition. Debtors oppose this motion, arguing that the relevant date with which to assess when the transaction occurred isn't the date the goods were received, but is rather the date the goods were shipped, which is pre-petition. So, Debtors are arguing that because the goods were shipped pre-petition, the whole transaction is a pre-petition transaction and doesn't fall within the ambit of 503 --

THE COURT: But since then, they've argued that you should just follow the order that covers all of these types of claims, procedurally.

MR. SMITH: Our position is, we are urging Court to adopt a reasoning of the Third Circuit in the In re World Import case.

THE COURT: There's a ... maybe I'm confusing

this. Isn't there now a procedural order for dealing with all of these types of claims?

MR. SMITH: There's a procedural order for 503(b)(9) claims which are not at issue today, and we agree with them that those are subject to that order and those will be raised at the appropriate time. With regard to the 503(b)(1) claims, there is an order on those procedures, this specific motion, and this specific circumstance, in which we're asking for a ruling on a very discreet legal issue, was carved out of that order. And we informed Debtors of this last Tuesday.

THE COURT: I'm not prepared to rule on this. It's now 3:30. I've been in court, basically, 12 hours a day since Monday. You're going to have to come back.

MR. SMITH: Thank you, Your Honor.

THE COURT: I'm sorry. You had to wait several hours but this is just not acceptable to me.

MR. SMITH: Thank you, Your Honor.

MS. MARCUS: The next matters, Your Honor, we categorized as automatic stay matters.

MS. PESHKO: Your Honor, the first of these matters is the motion of Mario Aliano for relief from a stay. I'm no sure whether counsel is in the courtroom.

MS. HARRIS: Good afternoon, Your Honor. This is Sharon Harris. I'm on telephonically from Chicago.

THE COURT: Good afternoon.

MS. HARRIS: Good afternoon. I represent Movant Mario Aliano. And this is motion to lift the stay in the civil litigation. All that's remaining in his case is on appeal. Just real briefly, the Circuit Court of Cook County Illinois entered a judgment against Sears for violation of the Illinois Consumer Fraud Act, and that was affirmed on appeal by the Illinois Appellate Court in 2015. And the matter was remanded on issue of attorneys' fees. There was a three-day evidentiary hearing and the Court awarded $267,470 in attorneys fees. Sears appealed the Circuit Court's award of the fees and Sears also (indiscernible) and obtained an approval of an appeal bond. The appeal bond covers the award plus one year of statutory interest.

THE COURT: But does it --

MS. HARRIS: So, the only thing --

THE COURT: I'm sorry. Does it actually cover the fees? I thought that was the issue.

MS. HARRIS: Debtors have raised the issue of the defense cost. The appeal has been fully briefed for several months, and all that's awaiting is the decisions by the Illinois Appellate Court. Debtors raise that there could be some cost involved in arguing the matter on appeal, but there's no guarantee that the Appellate Court would set the matter for oral argument. It's within the Court's

discretion as to whether to set it for oral arguments. And we're willing to waive our request for oral argument on the appeal in order for the matter to go forward. And even if here is oral argument, I think the cost to Debtors of defending that would really be minimal because, as I said, the matter has been fully briefed and it's just a matter of whether the Court, Illinois Appellate Court orders there to be oral argument in matter.

THE COURT: Okay.

MS. HARRIS: We've cited some cases in our brief that the causative defending litigation by itself is not necessarily enough to preclude relief from an automatic stay.

THE COURT: Okay. Let me hear from the Debtor's counsel.

MS. PESHKO: Your Honor, for the record, Olga Peshko, Weil Gotshal for the Debtors. This particular appeals bond is fully collateralized by Sears prepetition, Your Honor, in the amount of over $290,000. The Debtors have an interest in this money and they're not willing to waive their right to argue oral argument or to prepare for that. And there's a cost associated with that. If the Debtors do succeed at the appeal, then the matter may be remanded, there may be other further proceedings. And so, our view is that there's cause to keep the automatic stay in

place. Furthermore, Your Honor, there is no insurance available for the incident date related to this action to cover the Debtors' defense costs.

THE COURT: So, the appeal bond is collateralized, it's not paid for, it's collateralized.

MS. PESHKO: That's right.

THE COURT: So, it's not like insurance.

MS. HARRIS: Your Honor, if it makes a difference, we are willing -- the appeal ban covers the award plus one-year statutory interest. We're willing to waive recovery for attorneys' fees of any amount above and beyond the appeal bond amount.

MS. PESHKO: With respect, that does not account for the Debtors having to expend defense defend costs now.

THE COURT: Okay, but that does take care of the -- I mean, the only issue that's on appeal is he defense cost, right? So, they're not going against the appeal bond for that?

MS. PESHKO: The issue on appeal are attorney fees for the --

THE COURT: The attorneys' fees.

MS. PESHKO: Exactly.

THE COURT: So, maybe I misunderstood counsel. I thought she was saying that they were not going to look to the appeal bond for the attorneys' fees.

MS. PESHKO: I think == I don't want to put words in her mouth but -=

MS. HARRIS: No, that's not what I meant, Your Honor. What I'm trying to say is the only issue that's on appeal is the amount of attorneys' fees and the appeal bond covers the amount that the Circuit Court awarded plus one year's statutory interest.

THE COURT: So, that would include --

MS. HARRIS: So, it's been beyond --

THE COURT: So, that would include the attorneys' fees. The appeal bond includes the attorneys' fees.

MS. HARRIS: Yes.

THE COURT: So, what were you saying, that you would waive? I thought I heard you say you would waive some --

MS. HARRIS: The statutory interest beyond one year.

MS. PESHKO: The appeals bond doesn't cover that.

THE COURT: Okay. So, we're not relating anything. All right. Well ... How would the Debtors propose this get resolved otherwise, if I didn't lift the stay?

MR. FAIL: Your Honor, Garrett Fail, Weil Gotshal & Manges for the Debtors as well. Your Honor, this is one of a large number of pending litigations that will have to

be resolved post confirmation pursuant to a plan, whether part of a liquidated trust or whatever structure is proposed in that plan with the moneys available in judgments about what's worth pursuing at that point. At this point, though, with cash limited and a desire to protect the assets, the Debtors chose to oppose the motion to preserve the stay and status quo for an additional period which, for the cases to continue.

THE COURT: So then, on the phone, do you have a slot that you would lose with the Illinois Appellate Court if I denied your motion for a stay of relief? In other words, let's say I adjourned it until a date that I believe would be a reasonable date for a plan to be confirmed, so that will be post-confirmation, some time in August or September. There will be a determination whether to go and liquidate the claim at that point. Other than the delay, do you lose anything else, the delay between now and September?

MS. HARRIS: Well, I would say that the Appellate Court had the brief, fully-briefed, last August, I believe. So, in that respect they didn't get the suggestion of bankruptcy until October, and so we kind of lost our place in line with the Appellate Court deciding that, because they stayed the matter rather than ruling on the brief or ordering oral arguments.

THE COURT: So, it's still locked in place based

on the automatic stay.

MS. HARRIS: Right. I would just say we got the judgment against Sears and December 2015 it was affirmed, so we've been waiting all this time for the attorneys' fee.

THE COURT: Well, you're going to be waiting longer because it's -- the fees aren't covered anyway. So, this is a fairly close call under (indiscernible) but I will determine to adjourn the motion. I'm not going to require you to refile it, but I'm going to adjourn it because I believe the Debtors have a reasonable basis to win the motion, but that's only for a relatively brief period until the Debtors confirm a plan or something else dramatic happens in the case. So, you'll have to refile it. But you should get an adjourn date for the omnibus hearing in August.

MS. HARRIS: Thank you, Your Honor. Okay.

THE COURT: Okay. It's just I don't think that the result -- this is just liquidating a claim, except to the extent that you would get paid by the bond, but that hits the Debtor. It's not the equivalent of having an insurance policy that's already been paid for. So, the impact is significant and the reason to do it now as opposed to a few months from now is not dramatic enough to warrant lifting the stay, because it's a prepetition claim. So, I'll ask the Debtors to submit an order that adjourns the

motion, making the finding that I need to make under 362(e).

MS. PESHKO: Thank you, Your Honor, we will. The next item on the agenda is the motion of Steven Tuttle for relief from the stay. Your Honor, I wanted to note that the counsel that filed this motion has withdrawn as attorney for this party, so we don't know whether anyone is appearing on behalf of Mr. Tuttle.

THE COURT: Okay. Is anyone here or on the phone appearing on behalf of Steven Tuttle on this lift stay motion to pursue litigation in respect of a prepetition claim?

MS. PESHKO: Your Honor, I wanted to also note that while we file this objection to reserve our rights, because we don't have any insurance available of our own, we did confirm that a third-party insurer for the employer of Mr. Tuttle at the time of the incident is paying defense costs for Innovel, the debtor in this instance. However, after counsel withdrew we reached out to get contact information for his former client and he has not agreed to provide us with a phone number or email. So, we've been trying to reach out to reach a stipulation and we'd like to just adjourn without a date, to be able to get in touch with this party.

THE COURT: Okay, that's fine. We should provide the same type of order that I just directed in the last

matter. Have you communicated to former counsel that you've discovered this insurance at Innovel?

MS. PESHKO: That's what they've argued in their motion.

THE COURT: No, I thought you said -- no, I'm not talking about Sears. I thought you said there's a third party that as insurance, the actual employer of this individual.

MS. PESHKO: We haven't reached out to the employer, Your Honor.

THE COURT: No, no, I said, have you reached out to Mr. Tuttle's former counsel to let former counsel know that you've located this third-party insurance?

MS. PESHKO: That's right. That's who we reached out to try to negotiate a stipulation.

THE COURT: All right, so you told her that?

MS. PESHKO: Right.

THE COURT: All right. Because I was going to direct you to do that if you haven't, but you've already done it.

MS. PESHKO: We did it. We did that too, and tried to get the contact information afterwards.

THE COURT: Okay. All right, that's fine. So, you can just submit he adjournment order on that one.

MS. PESHKO: Will do.

THE COURT: It's likely that I would have denied the motion subject to a step dealing with going against the third-party insurance.

MS. PESHKO: Thank you, Your Honor. The next item is the motion of Jeffrey Pfeiffer to lift the stay. I'm not sure whether someone is here --

THE COURT: This is Mr. Pfeiffer's motion?

MR. GALLAGHER: Yes. Good afternoon, Your Honor, Dave Gallagher on behalf of Mr. Pfeiffer.

THE COURT: Right, good afternoon.

MR. GALLAGHER: Your Honor, if you'd like brief argument I would just state this is a motion to lift the stay with regards to a pre-suit action in Illinois that we filed in the Circuit Court of Cook County against K-Marts as well as a co-defendant, Monsanto, with regards to cancer that my client developed after use of Roundup. As the Court's aware of the (indiscernible) factors, the big issue with regards to the Defendant's objection -- the Debtor's objection -- is that of insurance coverage. The period of time with which Mr. Pfeiffer claims he purchased this Roundup spans from 1988 until 2014. The Debtor's counsel, their objection notes that their records with regards to coverage only go back to 2005. They do provide exhibits to their spots, which indicate that coverage is exhausted for multiple years. However, they did not provide any

explanation for coverage for the period of 2008 to 2009, which leaves me to believe that there was, in fact, coverage available for that time period. Their coverage does provide (indiscernible) defense for the case. The Claimant here simply seeks to move forward their claim. We believe there's available insurance coverage which would include the cost of defense and, in exchange, the Debtors would get complete relief from the claim other than whatever is available, and insurance proceeds. We believe it to be in the benefit of the Debtors and it would expediate the resolution of this claim.

THE COURT: I'm sorry, I missed the last sentence. I couldn't follow what you were saying. Can you --?

MR. GALLAGHER: Sure. It would be to the benefit of the Debtors, it would expediate the resolution of this claim.

THE COURT: It's a prepetition unsecured claim to the extent it's not been discharged in K-Mart's bankruptcy. If there is available insurance, I'm sure the Debtors would lift the, agree to lift the stay to let you go against the insurance. They're saying there isn't available insurance. You're saying that they haven't shown you that fact for 2008 through 2009? Okay.

MR. GALLAGHER: That's correct.

MS. PESHKO: Your Honor, that's correct. We have

not provided a certificate of exhaustion for that period. The Debtors believe there is no -- the insurance has been exhausted for that period. However, we are trying to obtain a copy from the insurer. We informed counsel that we would like an adjournment to be able to get information, also to confirm the discharge issue and counsel has not agreed to adjourn.

THE COURT: Do you have any problem lifting the stay solely as to 2008 and '09, to the extent that there is insurance and that the Claimant waives any other claim against K-Mart?

MS. PESHKO: If we can confirm that there is insurance we'll do that --

THE COURT: If part of the stip stays this waives a claim against the Debtors, except to the extent of any available insurance policy and we make no representation that there is one, is there any issue there?

MS. PESHKO: We would be willing to do that except, Your Honor, that Sears would be required to defend itself. I mean, K-Mart would be required to defend itself in this action. Or we could try to provide first a statement from the insurer that it's not there so that we don't have to proceed with the stipulation?

THE COURT: Well, what efforts are you making to determine that?

MS. PESHKO: We have reached out to the Debtors and we're trying to work with them to get this letter of exhaustion. It's just, we're just looking for additional time to do that, Your Honor.

MR. GALLAGHER: Your Honor, if I may, the issue for me is one of statute of limitations on my claims. These claims are going to be going forward on a discovery basis. I'm not sure of your familiarity with the Roundup litigation, but this has really started to be a public --

THE COURT: Well, it can certainly wait a month or two, I'm assuming, right?

MR. GALLAGHER: In theory, maybe. It's going to depend on what the parties respond as far as their response to the pleading filed in the State Court. But my client could suffer prejudice in the loss of his ability to bring these claims if we delay this inadvertently.

THE COURT: Well, there's nothing in the motion about whether he learned about Roundup, right? And apparently, he was buying it until 2014.

MR. GALLAGHER: That's correct. That's when he was diagnosed.

THE COURT: He was diagnosed in 2014?

MR. GALLAGHER: That's correct.

THE COURT: Okay. So, what is the statute of limitations for this type of claim in Illinois?

MR. GALLAGHER: It is two years from when you knew or should have known of the harm and the potential cause. So, the literature regarding the AML, my client's form of leukemia, and his exposure to Roundup really started coming out in 2017. There's a critical article that was published on November 9, 2017 that I would argue would be the point at which he knew or should have known of the association between AML and Roundup.

THE COURT: Okay. Adjourning this to the June omnibus day doesn't seem to affect the statute of limitations. And I thought you already commenced this lawsuit. You didn't? You haven't yet? All right.

MR. GALLAGHER: I have not yet. I was aware of the stay once I got --

THE COURT: All right. Have you filed a claim in this case?

MR. GALLAGHER: I did.

THE COURT: All right, so that's enough. You've asserted the claim. So, I'm going to adjourn this for two months so the Debtors can see whether it's worthwhile to enter into the type of stipulation that I mentioned for 2008, 2009.

MS. PESHKO: Thank you, Your Honor.

MR. GALLAGHER: Thank you, Your Honor.

MS. PESHKO: That was the last matter on the

agenda today.

THE COURT: Okay, very well.

MAN 1: Thank you very much for your (indiscernible) today --

THE COURT: I'm really impressed by those who stayed for the whole thing.

(Whereupon these proceedings were concluded at 3:41 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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